TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted]300

INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND CARBON COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1926

CERTIORARI GRANTED MARCH 22, 1926

(31,707)

(31,707)

SUPREME COURT OF THE UNITED STATES

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No. 984

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1926

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1926

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1925, of said Court, before the Honorable Robert E. Lewis and the Honorable William S. Kenyon, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the tenth day of March, A. D. 1925, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Utah, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America was Appellant and Carbon County Land Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States of America, District of Utah. } ss.

Pleas of the District Court of the United States for the District of Utah, at a stated term begun and holden at Salt Lake City, on the second Monday, being the tenth day of November in the year of our Lord nineteen hundred and twenty-four and the one hundred and forty-ninth of the Independence of the United States of America.

Present: Honorable Tillman D. Johnson, United States District Judge for District of Utah.

Transcript of the Record.

United States of America, vs. Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. } No. 8224, Equity.

Bill in Equity

filed in said Court on the 16th day of May, 1924, which being entitled in this Court and cause, is in words and figures following, to-wit:

(Bill of Complaint.)

To the Judge of the United States District Court for the District of Utah:

3 The United States by its undersigned solicitor acting herein under authority and direction of the Attorney General brings this bill of complaint against the Carbon County Land Company, a corporation, Independent Coal & Coke Company, a corporation, and Carbon County, and for cause of action alleges:

1. That the defendant companies are corporations organized under the laws of the State of Utah, with their offices and principal places of business in Salt Lake City, in said State and that Carbon County is a municipal corporation of the State of Utah.

2. That during the years 1901 to 1904 there were certified to the State of Utah under certain grants made to the State by the Act of July 16, 1894, (Stats. 109-110) the following described lands, to-wit:

The Northwest quarter and southeast quarter of Section 22; the east half of Section 27; the south half of Section 33; All of Section 34; the south half of Section 35; The north half of Section 26; the north half of section 33; all in Township 12 South, Range 11 East; All of sections one and three; The north half of stection 10; the north half of section 11; the north half of section 12; the southeast quarter of Section 12; the east half of the northeast quarter of Section fourteen (14); in township Thirteen South, Range 10 East; and Lots one, two, and three, and the southeast of the southeast in Section 3; Lot one, northeast quarter of northwest quarter, northeast quarter, North half of southeast quarter, Southeast quarter of Southeast quarter, of Section 7; Township 13 South, Range 11 East, all of Salt Lake Base and Meridian.

3. That the State of Utah executed contracts of sale to said lands to Stanley B. Milner, Truth A. Milner, Har-
4 ley O. Milner, Samuel H. Gibson, and that thereafter on January 7, [1927,] a suit was instituted in this Court by the United States against the said parties, and the defendant herein, the Carbon County Land Company, to which the said contracts of sale had been assigned, for the cancellation of said contracts of sale upon the ground that the said lands were mineral lands, and were known to be such at the time of their selection by the State; said suit was tried on the merits, and testimony was taken, and this Court entered its decree on June 8, 1914, as follows:

"In the District Court of the United States in and for" the District of Utah. Central Division.

United States of America, plaintiff vs. Truth A. Milner, Administratrix of the Estate of Stanley B. Milner, deceased, Truth A. Milner, Harley O. Milner, Carbon County Land Company, a corporation, and Peter N. Campbell, defendants	Old No. 901. New No. 281— In Equity. Decree.

This cause came on further to be heard at this term, and having been argued by counsel, upon consideration thereof,

It is ordered, adjudged and decreed as follows, to-wit:

That the plaintiff is the owner and entitled to the possession of the following described property, to-wit:

The northwest quarter (¼), the southeast quarter [(14)] of Section twenty-two (22); the east [hald] [(12)] of Section twenty-seven (27); the south half of Section thirty-three (33); all of Section thirty four (34); the south half (½) of Section thirty-five (35), in Township twelve (12) south, Range eleven (11) east, Salt Lake Meridian, containing 1920 acres.

The north half (½) of Section twenty-six (26), township twelve (12) south, Range eleven (11) east, Salt Lake Meridian, containing 320 acres.

The north half (½) of Section thirty-three (33), Township twelve (12) south, Range eleven (11) east, Salt Lake Meridian; Lots one (1), two (2), three (3), and the southeast quarter (¼) of the Southeast quarter (¼) of Section three (3) Township thirteen (13) south, Range eleven (11) east, Salt Lake Meridian, containing 477.04 acres.

All of Sections one (1) and three (3); the North half (½) of Section ten (10); the North half (½) of Section eleven (11); the north half of Section twelve (12), township thirteen (13) south, Range ten (10) east, Salt Lake Meridian, containing 2244.24 acres.

The southeast quarter (¼) of Section twelve (12), the east half (½) of the Northeast quarter (¼) of Section fourteen (14), Township thirteen (13) South, Range ten (10) east; Lot one (1); the northeast quarter (¼); the northeast quarter (¼) of the northwest quarter (¼); the north half (½) of the southeast quarter (¼); the southeast quarter (¼) of the Southeast quarter (¼) of section Seven (7), in Township thirteen (13) south, Range eleven (11) east; Salt Lake Meridian, containing 663 acres, making a total amount of five thousand, five hundred and sixty-four and twenty-eight hundredths (5564.28) acres, all situated in the County of Carbon, in the State of Utah, and that plaintiff's title thereto be quieted against any and all claims of the defendants or either of them, or of any person or persons claiming or hereafter to claim through or under the said defendant, or any or either of them; that said defendants, and each of them have no right, title or interest,
6 or right of possession in or to said premises hereinabove described, or to any part thereof; and that the said defendants, and [and] each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises or any part thereof, and all claims of said defendants, and each of them, are hereby quieted.

That the plaintiff be and is hereby adjudged and decreed to be the true and lawful owner of the said lands, as hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted against all claims, demands or pretenses whatsoever of the said defendants, and each of them.

It is further ordered, adjudged and decreed, that the plaintiff have and recover its costs herein, taxed at $907.20 against the defendants.

Dated this 8th day of June A. D. 1914.

JOHN A. MARSHALL,
Judge."

4. The decision of this Court was affirmed on appeal by the Circuit Court of Appeals on November 15, 1915, (228 Fed. 451), a copy of the opinion in which is attached hereto as an exhibit and is made a part of this bill.

5. The plaintiff further shows that the State of Utah was not made a party to said suit, and it was believed by the plaintiff that the State would leave to the determination of the Courts, the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination.

6. However, the State of Utah has not seen fit to so conform its subsequent action to the determination of the Courts, but, on the contrary, on February 10, 1920, the State
7 issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the before-mentioned suit.

7. The Independent Coal & Coke Company, a corporation, claims an interest in Section three (3) and the North half (½) of Section 10 (10) in Township thirteen (13) South, Range ten (10) East, the full nature and extent of which is unknown to plaintiff, and in respect of which a full discovery is asked of that defendant.

8. Carbon County is made defendant in this bill for the reason that it [claim] a part of said land under a purported tax sale in the year 1921. Plaintiff avers that the lands being the property of the United States were not subject to taxation.

9. The plaintiff avers that said lands have already been determined to be mineral lands and as such not subject to selection by the State, both by the decision of this Court and the Circuit Court of Appeals, and this question is, therefore, [illegible] data.

10. The plaintiff further avers that at all times the title to said lands has been equitably in the United States.

Wherefore, and now that the State of Utah has conveyed the legal title to said lands to the said defendant, Carbon County Land Company, the plaintiff prays that the defendant be adjudged and decreed to hold whatever title they have to the said lands [illegible] for the plaintiff, and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession, subject only to the mortgage taken by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the the plaintiff and the State in the Supreme Court of the United States; and that the defendants be restrained and enjoined from hereafter setting up any claim of title to said lands, or any part thereof, or in any manner inter-meddling therewith, or in removing any coal or other product therefrom; and may it please Your Honor to grant unto the plaintiff a Writ of Subpoena to be directed to the said Carbon County Land Company, the Independent Coal & Coke Company, and Carbon County thereby commanding them at a certain time and under certain penalty therein to be limited, personally to appear before this Court and then and there full true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby especially waived, and further to stand to perform and abide by such further order, direction and decree herein, as to this Honorable Court shall seem agreeable to equity and good conscience.

8

S. W. WILLIAMS,
Special Assistant to the Atty. Genl.
Solicitor for the United States.

Exhibit in Bill of Complaint

United States
vs.
Carbon County Land Company, et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1915).

Miner, et al.
v.
United States.

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

9 Suit in equity by the United States against Truth A. Milner, executrix of the will of Stanley B. Milner, deceased, and others. Decree for the United States, and defendants appeal. Affirmed.

H. C. Edwards, of Salt Lake City, Utah for appellants.

William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

Before Garland, Circuit Judge, and Amidon and Van Valkenburgh, District Judges.

Garland, Circuit Judge. This is an action by appellee to quiet the title to 5,564.28 acres of land situated in the County of Carbon, State of Utah. It is claimed by appellee that whatever apparent interest appellants have in the land was obtained by fraud, with the exception of Peter N. Campbell, who claims to have a lien by mortgage. Appellee was granted the relief prayed for in the court below, and appellants appeal.

Before proceeding to discuss the questions involved on this appeal, it is proper to state that by sections 8 and 12 of the act of Congress approved July 16, 1894 (28 Stat 109), there was granted to the state of Utah in the form of what is generally known as a "floating grant", many thousands of acres of land for the purpose of erecting an agricultural college, a school of mines, and a deaf and dumb asylum. Such lands were to be selected by the State from the unappropriated public lands of the United States in such manner as the Legislature thereof should provide, with the approval of the Secretary of the Interior. In 1896 the Legislature of Utah created a board of land commissioners and gave to it the control and management of the lands so granted.

Laws Utah 1896, c. 80. The board was also empowered to select and register such lands, and after this was done it was its duty to take such action as was necessary to secure the approval of the Secretary of the Interior and a final transfer of said selected lands to the State.

Between December 10, 1900, and September 14, 1903, appellants Stanley B. Milner, Truth A. Milner, Harley O. Milner and Samuel H. Gilson, made application to said board of land commissioners to purchase the land involved in this action. The application to purchase by Truth A. Milner, who was the wife of Stanley B. Milner, was made by said Stanley B. Milner as the agent of his wife. The application to purchase made by Harley O. Milner was made by Stanley B. Milner as agent. The following is the form of the application to purchase made in each instance by the appellants:

"Agreement to Purchase Selected Lands.

"County of Salt Lake, State of Utah—ss.:

"Personally appeared before me, a notary public in and for Salt Lake county, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who, being first duly sworn according to law, deposes and says that he hereby makes application to the state board of land commissioners for the selection by the State of the following described grazing lands (name the class):

No. Acres 320

	Sec.	Tp.	R.	
N ½	26	12 S	11 E	S. L. M.

In satisfaction of any grant to the State.

"That he is a native-born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provision of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one dollar and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 80 dollars and ..... cents, being 25 cents per acre for the land embraced in the application, is herewith deposited with the State board of land commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the state shall be determined to have a superior right or claim to said land, then, in either of said events, the state of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the state a bond conditioned that he will pay the full contract price for said land according to the terms of sale.

"5. That the state of Utah, by its proper officers, will agree to select said land in satisfaction of any of the government grants to the state in accordance with the laws of Utah, and, when so selected and patented to the state, will sell to affiant the same at private sale, for $1.50 per acre.

"TRUTH A. MILNER,
"By S. B. MILNER, Agent.

"Subscribed and sworn to before me this 17th day of April, 1901.

"(Seal) ELLRIDGE L. THOMAS, Notary Public."
Salt Lake City, Utah, Apr. 22, 1901.

12 "The State of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners, BYRON GROO, Secretary."

Each one of these applications was accompanied by an affidavit of each applicant, or his or her agent, of the tenor and effect following:

"State of Utah, County of Salt Lake,—ss.:

April 18, 1901.

"S. B. Milner, Agent, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said

land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes, under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons, that said land is [essentially] nonmineral land; and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

S. B. MILNER,
Agent.

13 "Subscribed and sworn to before me this 18th day of April, 1901.

"(Seal)

ELLRIDGE L. THOMAS,
Notary Public.

The board of land [commissioners] appointed Heber M. Wells and Byron Groo, who were respectively the president and secretary of said board, as selecting agents for the state. When a list of lands had been selected, these selecting agents filed it in the United States local land office at Salt Lake City, Utah. Said list was accompanied by the joint affidavit of said Heber M. Wells and Byron Groo of the tenor and effect following:

"State of Utah, County of Salt Lake—ss.:

"We, Heber M. Wells, and Byron Groo, authorized agents of the state board of land commissioners of the state of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section 12 of an act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state Government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted,

mineral, nor reserved lands, and are of the character contemplated by the grant in said act; that we have caused the lands mentioned to be carefully examined by agents and employees of the state as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel,
or other valuable mineral deposit; that no portion
14 of said land is claimed for mining purposes under the
local customs, or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, that the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named.

"that the land contains no salt spring or deposits of Salt in any form sufficient to render it valuable therefor.

HEBER M. WELLS
BYRON GROO
Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 15th day of September, 1903.

ELLRIDGE L. THOMAS,
Notary Public."

After a list of selected lands was filed in the local United States land office, the register and receiver of said land office made a certificate as follows;

"United States Land Office.

"Salt Lake City, Utah, September 15, 1903.

"We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the state of Utah, under the grant to it by the act of Congress, entitled 'An act to enable the people of Utah to form a Constitution

and State government, and to be admitted into the
15 Union on an equal footing with the original states,
approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands, or lands, nor claimed as swamp land; neither are there any homesteads, pre-emptions, nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said state of Utah has paid to the undersigned, the receiver, the full sum of twenty dollars, in full payment and discharge of said fees.

FRANK D. HOBBS,
"Register U. S. Land Office, Salt Lake City, Utah.

"GEO. A. SMITH,
"Receiver U. S. Land Office, Salt Lake City, Utah."

The list of selected lands was then forwarded to the Commissioner of the General Land Office, accompanied by the following statement:

"State Board of Land Commissioners,
"Salt Lake City, Utah, September 15th, 1903.

"I, Byron Groo, secretary of the state board of land commissioners of the state of Utah, hereby certify that Heber M. Wells, and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

BYRON GROO,
"Secretary State Board of Land Commissioners.
"List No. 52. Deaf and Dumb Asylum.
"List of Lands Selected by State of Utah.

16 "The undersigned, the duly authorized agents of the
State board of land commissioners of the State of Utah, under and by virtue of the Act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state government and to be admitted into the Union on equal footing with the original states' approved July 16,

1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed, unappropriated, unreserved, nonmineral public lands of the United States lying within the state of Utah, said lands being selected and to be applied under Section 12 of said act of Congress 'for the establishment and maintenance of a deaf and dumb asylum.'

HEBER M. WELLS,
"BYRON GROO,
"Agents for the State Board of Land Commissioners.

"Approved by Commissioner General Land Office December 1, 1904."

The application to purchase made by Stanley B. Milner was approved by the board of land commissioners on December 17, 1900, by the local land office on December 18, 1900, and the land certified to the State of Utah by the General Land Office June 22, 1901.

There were two applications by Truth A. Milner, by Stanley B. Milner, her agent. One was made April 19, 1901, approved by the board of land commissioners April 22, 1901, and by the local land office April 29, 1901, and the land certified to the state of Utah by the General Land Office December 23, 1901. The other was approved by the board of land commissioners April 2, 1902, by the local land office April 7, 1902, and the land certified to the state by the General Land Office July 9, 1902.

The application to purchase by Harley O. Milner, by his agent Stanley B. Milner, was approved by the board
17 of land commissioners March 24, 1903, by the local land office March 30, 1903, and the land certified to the state of Utah by the General Land Office May 8, 1904.

The application to purchase by Samuel H. Gilson was approved by the board of land commissioners December 15, 1903, by the local office September 2, 1903, and the land certified to the State of Utah by the General Land Office December 1, 1904. The price agreed to be paid for the lands was $1.50 per acre, payable in ten annual installments. No patents from the state of Utah have been issued to the defendants for the lands in controversy, but the payments as required by the contracts of purchase have been made as therein provided.

The application to purchase and the affidavit accompanying the same, together with the representations of the selecting agents and the resulting certificate of the local land officers, was the evidence upon which the Commissioner of the General Land Office acted in approving the selections. It is claimed by the United States that the certification of the lands by the General Land Office to the state was obtained by fraud, in this: that the applicants to purchase and the selecting agents appointed by the board of land commissioners together with the certificate of the local land officers, all showed the land to be nonmineral and that there was no deposit of coal within the limits thereof.

The affidavit accompanying the application to purchase in each instance stated that the person making the affidavit was well acquainted with the character of the land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land was such as to [anable] him to testify
18 [understanding] with regard thereto, and that there was not to applicant's knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal.

Appellee claims that the lands for which application to purchase were made were coal lands, and known to be such by the several applicants. The trial court found this to be true, and that the applications to purchase, and the action of the land office officials based thereon, should be canceled, and title to the lands quieted in the United States. Appellants seek to avoid and otherthrow this claim on the part of appellee on the following grounds:

1. That there was no fraudulent intention on the part of the appellants in applying to purchase the lands.

2. That the lands were not and are not coal lands, because coal is not exposed in commercially available quantities upon each legal subdivision of 40 acres.

3. That the selection of the lands in question having been made in good faith by the state of Utah under the grant of the act enabling Utah to be admitted as a state, it is immaterial whether or not the defendants falsely and fraudulently deceived and misled the selecting officers of the state of Utah as to the character of the lands.

4. That the Secretary of the Interior having certified the lands to the state of Utah under its grant, such certification

is conclusive as to the fact that the lands were of such character as to permit them to be selected under the grant.

(1) Applying the rule laid down by this Court in United States v. Diamond Coal & Coke Company, 191 Fed. 786, 112 C. C. A. 272, and in the same case, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, we are of the opinion after a careful consideration of the evidence that the lands in controversy were at the time of their certification by the Secretary of the Interior to the state of Utah and at the several dates of purchase known coal lands. The same contention is made in this case as was made in the case cited, namely, that lands cannot be regarded as coal lands unless coal in quantity and quality to render its extraction profitable is actually disclosed within their boundaries. In answer to such a contention Justice Van Devanter in the case cited used the following language:

"There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surroundings or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate."

The evidence [shown] beyond question that the lands involved in this action lie along and adjacent to what is commonly known as the "Book Cliffs," or the "Book Cliffs Coal Fields," a sedimentary formation designated as cretaceous, extending from Castle Gate, Utah, eastward to and beyond the Colorado-Utah line. The cliffs themselves [from] the edge of a plateau, and the coal outcropping in the cliffs extends back from the escarpment beneath the plateau lands. Throughout these deposits the coal occurs interstratified with the sedimentary rocks. Three experts examined these lands for the government and testified at the trial as to their character, and all [express] the same opinion as to the character of the lands. These lands lie immediately north of and above a pronounced coal formation upon which at the date of purchase of the lands in question four well known coal mines were being worked upon veins of coal varying in thickness from 7 to 22½ feet; said veins dipping directly into the lands in question. It appears that at no place within the lands involved in this action does the cover above the coal exceed 2,500 feet, and the evidence is uncontroverted that coal at such depth, and of

such quality and quantity as carried by the veins dipping beneath these lands, can be profitably extracted, even though it be necessary that they be mined through shafts or in lines.

As to the fraudulent intent of appellants, they must be held to have intended the natural and probable result of their acts. Gilson and Milner were both men of mature years and had great experience in the business of mining. Gilson testified that some time in 1880 he and Stanley B. Milner entered into an agreement to acquire title to certain lands in Carbon county, Utah, and they were well acquainted with the character of the lands in question, and determined they were not coal lands because there was not disclosed upon their surface coal in quantity and quality to render its extraction profitable. The affidavit accompanying each application to purchase, as we have before stated was to the effect that the applicant was well acquainted with the character of said lands and of [evert] legal subdivision thereof, having frequently passed over the same, and from applicant's personal knowledge was able to state that there was no deposit of coal thereon.

(H) We are satisfied that appellants knew the character of the lands in question, and, having made false statements in regard to the same, must be held to have intended to defraud. Counsel for appellants cite the case of Edmund Burke v. Southern Pacific Railroad Company, 234 U. S. 669, 34 Supt. Ct. 907, 58 L. Ed. 1528, in support of their contention that the approval by the Secretary of the Interior of the selection list containing the lands in question is final and conclusive that the lands were of the character to be certified to the state of Utah under the grant of 1894. No support for any such contention can be found in that case as applied to the facts in the case at bar.

Justice Van Devanter in the Burke case is careful to point out that the rule there announced as to the finality of the action of the Secretary of the Interior does not apply in cases where the officers of the United States have acted upon ex parte fraudulent and false statements. At 234 U. S. 689, 34 Sup. Ct. 915, 58 L. Ed. 1528, in the opinion it is said:

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitled the Secretary of the Interior to have the patent canceled, as was done in Morton v. Nebraska, 21 Wall. 660 (22 L. Ed. 639), and in

Western Pacific Railroad Company v. United States, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 862, 27 L. Ed. 621, 806. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals."

Again, (234 U. S. 682, 34 Sup. Ct. 916, 58 L. Ed. 1527) it is said:

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a nonmineral land law, or if they issue such patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such
22 rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers, who had no interest in the land at the time the patent was issued and were not prejudiced by it. Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 313 (8 Sup. Ct. 131, 31 L. Ed. 182); Diamond Coal Co. v. United States, 233 U. S. 236, 239 (34 Sup. Ct. 597, 58 L. E. 936); Germania Iron Co. v. United States, 165 U. S. 379 (17 Sup. Ct. 357, 41 L. Ed. 754); Duluth & Iron Range Railroad Co. v. Roy, 173 U. S. 587, 590 (19 Sup. Ct. 548, 43 L. Ed. 820); Hoofnagle v. Anderson, 7 Wheat, 212, 214, 215 (5 L. Ed. 438)."

In the case of Washington Securities Company v. United States 234 U. S. 76, 34 Supt. Ct. 725, 58 U. Ed 1220, Justice Van Devanter again said:

"It is contended also that the proceedings resulting in the patents were not ex parte, but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the government. No doubt those officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents; but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly ex parte. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government save in the sense that the land officers did so. As this court has

often held, the findings of the land officers in such a proceeding, although not open to collateral attack, are not conclusive against the government when it sues to
23 cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S. 233 (5 Sup. Ct. 836, 29 L. Ed. 110); McCaskill Co. v. United States, 216 U. S. 504 509, (30 Sup. Ct. 386, 54 L. Ed. 590 and cases cited. In such a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces [convicion]. Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239 (34 Sup. Ct. 507, 58 L. Ed. 936)."

(III. LV) It is not the claim of appellee that the officers or [slelecting] agents of the State of Utah or the land officers were guilty of fraud, but that they were imposed upon by the false statements of the appellants and relied upon the same as did the officers of the local land office at Salt Lake City. The applicants to purchase the land in question, the selecting agents of the state, and the land officers of the United States all acted on the theory that mineral lands or lands containing a deposit of coal did not pass under the grant. It is not claimed that such lands passed, in the briefs of counsel, and the pleadings practically admit the allegation of the bill that the lands granted were to be non-mineral. We are of the opinion, however, that no such contention could be sustained under the facts in this case. Section 2318, R. S. U. S. (Comp. St. 1913, Par. 4613), provides:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

We, held in Frederick A. Sweet, Administrator, v. United States, 228 Fed. 421, ...C. C. A....., that under section 6 of the act of July 16, 1894, (28 Stat. 109) which specifically granted sections 2, 16, 32 and 36 in every township
24 of the proposed State of Utah, mineral lands passed to the State of Utah. We think, however, the case at the bar is clearly distinguishable from that case. Section 6 granted specific lands without qualification or exception and we were of the opinion that to hold that mineral lands were excepted therefrom would be to interpolate into the section by interpretation language that Congress did not choose to use. In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this

opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States. It was decided in Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, that section 2318, above mentioned, included coal lands. Congress did not know when sections 8 and 12, supra, were enacted, what lands the state would select, and therefore could not have had any particular lands in view. When the Secretary of the Interior came to approve the selections made by the state, he was prohibited by section 2318 from approving the selection of mineral or coal lands. It appears from the record that all the agreements to purchase involved in this action were assigned to the Carbon County Land Company of the stock of which Stanley B. Milner is the owner of 99,950 shares, of a total of 100,000 shares capital stock. We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States.

Decree affirmed.

Filed in United States District Court, District of Utah, May 16, 1924. John W. Christy, Clerk.

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25 Motion to Strike of Independent Coal & Coke Company

And now comes the Independent Coal & Coke Company, a corporation, one of the defendants above named and moves the Court to strike from the Bill of Complaint of the defendant that portion of Paragraph 5 which reads as follows, to-wit:

"And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination," on the ground that said allegation is irrelevant, immaterial, and redundant.

And the said defendant further moves the Court to strike Paraphagh 9 of said Bill of Complaint, on the ground that the same is irrelevant, immaterial, and redundant.

M. E. WILSON
F. C. LOOFBOUROW &
A. R. BARNES,
Attorneys for defendant, Independent Coal & Coke Company.

Service of a copy of the above & foregoing motion to strike acknowledged the 4th day of Sept. 1924.

CHAS. M. MORRIS,
U. S. Attorney.

Filed in United States District Court, District of Utah, Sep. 4, 1924. John W. Christy, Clerk.

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26 Motion to Dismiss of Independent Coal & Coke Company

And now come the Independent Coal & Coke Company, a corporation, one of the defendants above named, and moves to dismiss the Bill of Complaint in the above [title] cause on the following grounds, to-wit:

1.

That the said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2.

That it affirmatively appears from the face of the complaint, that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of the United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint; said Federal statute being: Section 8 of the Act of March 3, 1891, Chapter 561.

M. E. WILSON
F. C. LOOFBOUROW
A. R. BARNES,
Attorneys for defendant, Independent Coal & Coke Company.

Certificate.

We hereby certify that we, and each of us, are attorneys for the defendant in the above entitled cause; and fur-

ther certify that in our opinion the grounds stated in the above motion are well founded.

M. E. WILSON
FREDERICK C. LOOFBOUROW
ALBERT R. BARNES.

Service of a copy of the above and foregoing motion to dismiss acknowledged this 4th day of Sept. 1924.

CHAS. M. MORRIS,
U. S. Attorney.

Filed in United States District Court District of Utah Sep 4, 1924. John W. Christy, Clerk.

Motion to Dismiss of Carbon County Land Company

And now comes the Carbon County Land Company, a corporation, one of the defendants above named, and moves to dismiss the Bill of Complaint in the above entitled cause on the following grounds, to-wit:

I.

That the said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

II.

That it affirmatively appears from the face of the complaint that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause accrued
28 to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of the United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint; said Federal statute being Section 8 of the Act of March 3, 1891, Chapter 561.

SAMUEL A. KING,
RUSSELL G. SCHULDER,
Attorneys for defendant, Carbon County Land Company.

We hereby certify that we and each of us are attorneys for the defendant in the above entitled cause; and further certify that in our opinion the grounds stated in the above motion are well-founded in law.

SAMUEL A. KING
RUSSELL G. SCHULDER

Service acknowledged this 20th day of Sept. 1924.

EDW. M. MORRISSEY,
Asst, U. S. Atty.

Filed in United States District Court District of Utah Sep 20, 1924. John W. Christy, Clerk.

Motion to Strike of Carbon County Land Company

And now comes the Carbon County Land Company, a corporation, one of the defendants above named and moves the Court to strike from the Bill of Complaint of the defendant that portion of paragraph 5 which reads as follows, to-wit:

"And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination, on the ground that said allegation is irrelevant, immaterial and redundant.

And the said defendant further moves the Court to strike paragraph 9 of said Bill of Complaint, on the ground that the same is irrelevant, immaterial and redundant.

SAMUEL A. KING,
RUSSELL G. SCHULDER
Attorneys for defendant Carbon County Land Company

We hereby certify that we, and each of us, are attorneys for the defendant in the above entitled cause; and further certify that in our opinion the grounds stated in the above motion are well-founded in law.

SAMUEL A. KING,
RUSSELL G. SCHULDER

Service acknowledged this 20th day of Sept. 1924.

[EWD.] M. MORRISSEY
Asst. U. S. Atty.

Filed in United States District Court District of Utah Sep 20, 1924. John W. Christy, Clerk.

Motion to Dismiss of Carbon County

30 Comes now Carbon County, a municipal Corporation of the State of Utah and one of the defendants above named and moves the Court to dismiss the Bill of Complaint in the above entitled cause upon the following grounds, to-wit:

1. Upon the ground that said Bill of Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against Carbon County, one of the defendants.

2. That it affirmatively appears from the face of the said Bill of Complaint that if any cause of action is stated in favor of the plaintiff against the defendant, that more than six years have intervened between the time said cause accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the Statute of Limitations, made and enacted by the Federal Congress of United States Government, controlling and governing such causes of action as are attempted to be stated in the Bill of Complaint, said Federal Statute being Section 8, of the Act of March 3, 1891, Chapter 561.

HENRY RUGGERI,
Attorney for defendant, Carbon County.

Certificate.

I hereby certify that I am Attorney for Carbon County, one of the defendants in the above and foregoing action, and further certify that in my opinion the grounds stated in the above motion are well founded in law.

HENRY RUGGERI

Service acknowledged this 20th day of Sept. 1924.

EDW M. MORRISSEY,
Asst. U. S. Atty.

Filed in United States District Court, District of Utah, Sep 20, 1924. John W. Christy, Clerk.

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31 **Motion to Strike of Carbon County**

Comes now Carbon County, a body [corporation] and politic of the State of Utah, one of the defendants above named and moves the Court to strike from the bill of complaint of the plaintiff's that portion of paragraph five which reads as follows: "And it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State in acquiring title to the lands, and conform its subsequent action to that determination, on the ground that said allegation is irrelevant, immaterial and redundant.

And the said defendant further moves the Court to strike paragraph nine of said bill of complaint on the ground that the same is irrelevant, immaterial and redundant.

HENRY RUGGERI,
Attorney for Carbon County,
one of the defendants.

Service of a copy acknowledged Sept. 20th, 1924.

EDW. M. MORRISSEY,
Asst. U. S. Attorney.

Filed in United States District Court District of Utah Sep 20, 1924 John W. Christy, Clerk.

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32 (Order sustaining motions to dismiss Bill of Complaint, with leave to plaintiff to amend bill.)

December 17, 1924.

In this cause on the 17th day of December, 1924, the separate motions of said defendants to dismiss the bill herein having heretofore come on regularly for hearing, and having been argued and submitted and by the Court taken under advisement, now after due consideration and the Court being well advised in the premises doth order that said motions be and they are hereby sustained with leave to plaintiff to amend its bill within thirty days in accordance within a written opinion this day handed down and filed herein.

(Opinion of the District Court in sustaining of motions to dismiss.)

The certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the act of March 3, 1891.

The motion of defendants to dismiss will be sustained on the ground that the cause of action alleged in the complaint is barred under the provisions of said section, with leave to plaintiff to amend its complaint within thirty days from this day, if it shall be so advised.

Filed in United States District Court District of Utah Dec 17, 1924. John W. Christy, Clerk.

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33 (Decree, January 21, 1925.)

This cause came on to be heard at the April Term, 1924, of the above-entitled Court, and was argued by counsel and taken under advisement, and thereupon upon consideration thereof at this, the November 1924-25 Term of this Court;

It Is Now Hereby Ordered, Adjudged and Decreed, as follows:

1. That this action and the bill of complaint of the plaintiff herein be and the same are hereby dismissed with prejudice.

And it is further hereby ordered, adjudged and decreed that the defendants have and recover their costs herein taxed at $..... against the plaintiff.

Dated this 21st day of January, A. D. 1925.

THILMAN D. JOHNSON, Judge.

Filed in United States District Court District of Utah Jan 21, 1925. John W. Christy, Clerk.

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34 (Petition for appeal and allowance thereof.)

The above named Plaintiff, feeling itself aggrieved by the decree made and entered on the twenty-first day of January, 1925, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed

herewith, and prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

S. W. WILLIAMS
Solicitor for the Plaintiff.

The foregoing claim of appeal is hereby allowed.

TILLMAN D. JOHNSON
United States District Judge.

Filed in United States District Court District of Utah Feb. 21, 1925. John W. Christy, Clerk.

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35 Assignment of Errors.

Now comes the United States by its Solicitor, and in connection with the petition for appeal filed herein says; that in the decree heretofore entered in said cause the Court erred in the following particulars:

1. The Court erred in holding that the suit was barred by the Statute of Limitations.

2. The Court erred in not holding that the suit instituted in 1907 was a direct attack upon the certification.

3. The Court erred in not declaring a trust in favor of the United States.

4. The Court erred in dismissing the Bill of Complaint.

Wherefore, the Plaintiff prays that said decree be reversed and for such other and further relief as it may be entitled to in equity and good conscience.

S. W. WILLIAMS
Solicitor for the United States.

Filed in United States District Court District of Utah Feb 21, 1925. John W. Christy, Clerk.

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36 (Praecipe for Transcript.)

To the Clerk of the Above Entitled Court:

You are requested to make an authenticated transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal allowed in the above entitled cause, and to include in such transcript

of record the following and no other papers filed in said cause:

Bill of Complaint;

Motions of defendants against said Bill of Complaint.

Opinion of the Court.

Final Decree dismissing Bill.

Petition for Appeal and Order allowing same.

Assignment of Errors.

Original citation showing service, and this Praecipe.

S. W. WILLIAMS,
Solicitor for the United States.

Service of this Praecipe acknowledged this 19th day of Feb. 1925.

WILSON, LOOFBOUROW & BARNES,
W. E. WILSON,
Attorneys for defendant, Independent, Coal & Coke Co.

O. K. CLAY,
County Atty., Carbon County, Utah.

KING & SCHULDER,
RUSSELL G. SCHULDER,
Attorneys for Carbon County Land Company.

Filed in United States District Court District of Utah Feb 23, 1925. John W. Christy, Clerk.

37

Citation on Appeal.

In the United States District Court in and for the District of Utah. Central Division.

United States of America, Plaintiff, vs. Carbon County Land Company, The Independent Coal and Coke Company and Carbon County, Defendants.	No. 8224, Equity.

To Carbon County Land Company, Independent Coal and Coke Company, and Carbon County, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the

Eighth Circuit, to be held at the City of Saint Louis, Missouri, sixty (60) days from date of this citation, pursuant to an appeal on the part of the United States filed in the Clerk's Office of the United States District Court for the District of Utah in the above entitled cause, to show cause, if any there be, why the decision of the District Court in said appeal mentioned should not be reversed and corrected, and speedy justice should not be done in that behalf.

Given under my hand, Salt Lake City, District of Utah, this 19th day of Feby 1925.

TILLMAN D. JOHNSON,
Judge of the United States District Court.

Attest:
JOHN W. CHRISTY,
Clerk,

(Seal United States District Court, District of Utah.)

Service of citation is acknowledged this 19th day of February, 1925.

WILSON, LOOFBOUROW & BARNES
M. E. WILSON,
Attorneys for Independent Coal & Coke Co. Attorneys for Defendants.

O. K. CLAY,
County Atty Carbon County.

KING & SCHULDER
RUSSELL G. SCHULDER
Attorneys for Carbon County Land Company.

Lodged in Clerks office February 23, 1925. John W. Christy Clerk.

38

Certificate of Clerk.

United States of America } ss.
District of Utah. }

I, John W. Christy, Clerk of the District Court of the United States for the District of Utah, do hereby certify that the foregoing pages numbered from one to thirty-six,

both included, contain a full, true, correct and complete copy and transcript of the record, papers and proceedings designated in the praecipe for transcript of the record in that certain suit wherein the United States of America is plaintiff and Carbon County Land Company, Independent Coal and Coke Company and Carbon County, are defendants, numbered 8224, in equity, on the dockets of said Court as full, true, correct and complete as the originals thereof now remain of record and on file in my office, omitting the following papers and proceedings not specified in said praecipe, to-wit:

May	21 '24	Subpoena in Equity and return.
June	2 '24	Notice of lis pendens.
	3	Order time to plead and appearances.
July	26 '24	Order time to plead extended and stipulation.
Aug	30 '24	Order time to plead and set for trial.
Sep	27 '24	Order setting hearing motions.
Oct	3	Entry hearing motions.
	4	Entry hearing motions resumed.
	6	Entry hearing motions concluded and under advisement.

I further certify that the original citation in this cause is hereunto annexed and transmitted herewith.

In Witness Whereof I have hereunto subscribed my
39 name and affixed the seal of said Court at Salt Lake City, in said district this 5th day of March, in the year of our Lord nineteen hundred and twenty-five and the one hundred and forty-ninth year of the Independence of the United States of America.

JOHN W. CHRISTY Clerk.
United States District Court District of Utah.

(Seal United States District Court District of Utah.)

Filed Mar 10 1925 E. E. Koch Clerk.

29 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. S. W. Williams, Special Assistant to the Attorney General, as Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

S. W. WILLIAMS,
Spl. Asst. to the Atty. Genl.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 14, 1925.

(Appearance of Mr. Charles M. Morris, United States Attorney, as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

CHAS. M. MORRIS,
United States Attorney for Dist. of Neb.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 25, 1925

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30 (Appearance of Mr. Eustace Smith, Special Assistant to the Attorney General, as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

EUSTACE SMITH,
Spl. Asst. to the Atty. General of the United States.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 21, 1925.

(Appearance of Mr. Mahlon E. Wilson, Mr. Frederick C. Loofbourow and Mr. Albert R. Barnes as Counsel for Appellee Independent Coal & Coke Company.

The Clerk will enter my appearance as Counsel for the Appellees.

MAHLON E. WILSON,
FREDERICK C. LOOFBOUROW,
ALBERT R. BARNES,
Attorneys for appellee Independent Coal & Coke Co.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 17, 1925.

(Appearance of Mr. O. K. Clay as Counsel for Appellee, Carbon County.)

The Clerk will enter my appearance as Counsel for the Appellee, Carbon County.

O. K. CLAY,
County Atty. Price, Utah.

31 (Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 24, 1925.

(Appearance of Messrs. King & Schulder as Counsel for Appellee, Carbon County Land Company.)

The Clerk will enter my appearance as Counsel for the Appellee, Carbon County Land Company.

RUSSELL G. SCHULDER,
SAMUEL A. KING,
630 Judge Building,
Salt Lake City, Utah.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 26, 1925.

(Order of Submission.)

September Term, 1925,

Monday, September 21, 1925.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Eustace Smith, Special Assistant to Attorney General, for appellant, continued by Mr. M. E. Wilson for appellee Independent Coal and Coke

Company, and by Mr. Russell G. Schulder for appellee Carbon County Land Company, and concluded by Mr. Eustace Smith, Special Assistant to Attorney General, for appellant.

Thereupon, this case was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

32

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, A. D. 1925.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

Mr. Eustace Smith, Special Assistant to the Attorney General (Mr. S. W. Williams, Special Assistant to the Attorney General, filed the brief), for appellant.

Mr. Mahlon E. Wilson (Mr. Frederick C. Loofbourow and Mr. Albert R. Barnes were with him on the brief), for appellee Independent Coal and Coke Company.

Mr. Russell G. Schulder (Mr. Samuel A. King and Mr. Creighton G. King were with him on the brief), for appellee Carbon County Land Company.

Mr. O. K. Clay, County Attorney, filed a brief for appellee, Carbon County.

Before Lewis and Kenyon, Circuit Judges, and Munger, District Judge.

Lewis, Circuit Judge, delivered the opinion of the court.

The appellant filed its complaint in the District Court on May 16, 1924, against appellees, Carbon County Land Company, Independent Coal and Coke Company, corporation, and Carbon County, Utah, alleging that: (a) During the
33 years 1901 to 1904 there were certified to the State of Utah, under the Act of July 16, 1894 (28 Stat. 107), certain described lands, in all 5564.28 acres; (b) the State of Utah executed contracts of sale of said lands to named individuals who assigned them to Carbon County Land Com-

pany; (c) thereafter, in January, 1907, this appellant brought suit in the United States court for the District of Utah against said individuals and the Carbon County Land Company for the cancellation of said contracts, on the ground that the lands were mineral lands and were known to be such at the time they were selected by the State, said suit was tried on its merits and said court entered a decree on June 8, 1914, wherein it was adjudged that plaintiff (this appellant) was the true and lawful owner of said lands and its title thereto was quieted against all claims, demands or pretenses whatsoever of the defendants in that suit, or of any person or persons claiming, or thereafter to claim, through or under the said defendants or any or either of them, that said defendants had no right, title or interest or right of possession in or to said premises, and each of them was perpetually restrained and enjoined from setting up or making any claim to or upon said premises; (d) that decree was affirmed by this court on November 15, 1915 (Milner vs. United States, 228 Fed. 431); (e) on February 10, 1920, the State of Utah issued its patent to said lands to the Carbon County Land Company, the same company to which the contracts of sale had been assigned; (f) appellee Independent Coal and Coke Company now claims an interest in a part of the lands; (g) Carbon County was made defendant because it claims part of the lands under a tax sale made in the year 1921; and it was prayed that defendant Carbon County Land Company be adjudged and decreed to hold whatever title it has to said lands in trust for the plaintiff, to convey the same to plaintiff and deliver to plaintiff any patent or deeds to said lands in its possession, that defendants be enjoined from intermeddling with said lands and removing coal therefrom. Each of the appellees moved to dismiss, on the ground that the suit was barred by the Statute of Limitations, Act March 3, 1891 (26 Stat. 1095). The court sustained each motion on the ground stated and dismissed the bill. This appeal was then taken. In so ruling the learned District Judge said:

"The certification by the Secretary of the Interior of the lands in question to the state of Utah was in legal effect a patent, and in my opinion comes within the meaning of the word patent as used in Section 8 of the act of March 3, 1891."

34 In United States vs. Winona & S. P. R. R. Co., 165 U. S. 463; Shaw vs. Kellogg, 170 U. S. 312, and other cases, it has been held that a certification of lands by the Secretary under statutory authority therefor has the same

legal effect as a patent; and it is argued here that this suit was brought to avoid the certification. We think a mere reading of the bill demonstrates that view is a misconception. As to this suit, it is rather an acceptance of the Secretary's certification than an attack upon it. The Act of March 3, 1891, provides that suits to vacate and annul patents shall only be brought within six years after the date of the issuance of such patents. This suit was not brought to vacate and annul the Secretary's certificate. That is no part of its purpose. No such relief is sought. We think the statute relied on has no application to this case.

In the Milner case, 228 Fed., we reviewed at length the fraudulent methods resorted to for the purpose of procuring certification of the lands to the State for the use and benefit of Carbon County Land Company. The plan made use of the State as a mere conduit through which the lands were to be fraudulently acquired. The State also, as well as the Secretary, seems to have been imposed upon. Before the lands were selected by the State and certified to it the individual defendants in the former suit entered into contracts with the State to purchase the lands at a nominal sum per acre, in event it obtained the certification, and they assigned those contracts to Carbon County Land Company, which company they owned and controlled. They induced the State and Secretary to act on false representations that the lands were not mineral lands, nor valuable as coal lands. According to the charges in this complaint, the legal title passed through the State to that company after it was finally decided that as between appellant and Carbon County Land Company all of the lands belonged to the United States and its title thereto was quieted as against that company. Perforce that decree Carbon County Land Company, in accepting a patent from the State, obtained nothing but the bare legal title. On the facts stated it acquired no beneficial interest in the lands as against the United States, and the purpose of this suit is to obtain a decree that it holds that title in trust for appellant and to compel it to convey the legal title to appellant.

The several motions to dismiss challenged the sufficiency of the bill, on the ground also that the facts pleaded did not show cause for equitable relief.

35 The suit is in aid of the former decree, to obtain the benefits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly ac-

cording to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root vs. Woolworth, 150 U. S. 401; Shields vs. Thomas, 18 How. 253, 262; Thompson vs. Maxwell, 95 U. S. 391, 399; Story's Equity Pleadings, Secs. 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleading says (p. 74):

"But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * (75) But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill."

The same authority, on page 98, in reference to bills, not original, to carry a decree into effect, says:

"The necessity for this kind of bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * * it may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer."

And the text of both authorities leaves no doubt that on the facts here an assignee of part may be joined as a party with his assignor.

If the case stated in the bill should be made out, it would seem clear that the relief sought should be granted,—as to Carbon County Land Company, that it convey to appellant all of the lands title to which stood in its name when this suit was brought, and deliver to appellant any patent or other conveyance to it from the State; as to Independent Coal and Coke Company, that it make like conveyance of any of the lands conveyed to it, in which it acquired an interest with notice of appellant's rights, or without value. Meader vs. Norton, 11 Wall. 442, 458; Moore vs. Crawford, 130
36 U. S. 122, 128; Jones vs. Van Doren, 130 U. S. 684, 691; Monroe Cattle Co. vs. Becker, 147 U. S. 47, 57. In Moore vs. Crawford, supra, the Chief Justice, speaking for the court, said:

"Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.' Pomeroy Eq. Jur. Sec. 1053."

We think it obvious that the ground on which Carbon County was brought into the case is distinct and independent of anything alleged against the other two defendants, and that the latter have no concern with any relief that might be granted appellant against the county. There is no common interest between it and the other defendants, they are not mutually interested in any issue and the bill was multifarious and subject to demurrer on that ground, although not stated in the motion to dismiss. Walker vs. Powers, 104 U. S. 245, 251; United States vs. Bell Tele. Co., 128 U. S. 315, 352.

The decree below is reversed with direction to dismiss the suit as against Carbon County, Utah, without prejudice, and to permit the other defendants to answer.

Filed November 17, 1925.

37

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1925.
Saturday, November 21, 1925.

United States of America, Appellant,
No. 6987. vs.
Carbon County Land Company, Independent Coal and Coke Company, and Carbon County,

Appeal from the District Court of the United States for the District of Utah.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the suit as against Carbon County, Utah, without prejudice, and permit the other defendants to answer.

November 21, 1925.

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38 (Motion for an order extending time to file petition for rehearing.)

Salt Lake City, Utah.
December 30, 1925.

Mr. E. E. Koch, Clerk,
Circuit Court of Appeals,
Eighth Circuit,
St. Louis, Mo.

My dear Mr. Koch:

I have just returned from having a talk with Mr. Wilson about the case of United States vs. Carbon County Land Company, et al., in which the Circuit Court of Appeals handed down its opinion some little time ago. The way we compute the time to file a petition for rehearing, it will expire on the 17th day of January. Mr. Wilson is very much engaged in the trial of cases now, and I am forced to leave next week for New York and Washington. I would like to go to St. Louis, but I will be rushed for time, and will have to go the quickest way. Will you, therefore, be good enough to see that order is made in the case at once, giving us sixty days additional time in which to prepare, serve and file petition for rehearing in that case? Please also have the order include all of the appellees, to-wit, the Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. Please obtain the order and advise me with respect to the same by return mail, if possible, as I will go to St. Louis if necessary in order to secure the same. I will have to be in Denver the last of next week, and if Judge Lewis is there I will obtain the order personally, but no doubt the usual procedure is to have you obtain it for us.

. . . . . .

Very truly yours,

KING & SCHULDER,
RGS-F by Russell G. Schulder

39 (Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 12, 1926.

(Order extending time to file Petition for Rehearing.)

December Term, 1925.
Tuesday, January 12, 1926.

On motion of counsel for appellees, It is ordered by this Court that the time for filing a petition for rehearing in this cause, be, and the same is hereby, extended and enlarged for a period of thirty days beyond the time fixed by the rules of this Court for the filing of such a petition.

January 12 1926.

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40 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Utah as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant and the Carbon County Land Company, et al., were Appellees, No. 6987, as full true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of February, A. D. 1926.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 22, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]300

FEB 17 1926

WM. R. STANSBU
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

INDEPENDENT COAL AND COKE COMPANY and
CARBON COUNTY LAND COMPANY,
Petitioners.

v.

UNITED STATES OF AMERICA and CARBON COUNTY,
Respondents.

PETITION OF INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY FOR WRIT OF CERTIORARI, AND SUPPORTING BRIEF.

WILLIAM D. RITER,
Attorney for Independent Coal and Coke Company.

FRANK K. NEBEKER,
Attorney for Carbon County Land Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

INDEPENDENT COAL AND COKE COMPANY and
CARBON COUNTY LAND COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA and CARBON COUNTY,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Independent Coal and Coke Company and Carbon County Land Company, respectfully show:

This case [1] involves the validity of the title of the State of Utah to lands acquired under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107. That Act (sec. 12) granted to the State several hundred thousand acres and provided (sec. 13) that they should be

[1] The suit was instituted by the United States against Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. The Court of Appeals ordered a dismissal as to Carbon County. The record is so brief (pleadings, etc.) that references to the same as an aid to the Court (*Furness, etc. v. Yang-Tsze, et al.*, 242 U. S. 430) are deemed unnecessary.

selected under the direction of the Secretary of the Interior. The State made selections and the lands were certified in 1901-1904. The State's title and right to convey are challenged by the United States.

Suit was instituted in 1924. The District Court sustained motions to dismiss and the bill was dismissed. Its decree was reversed by the Eighth Circuit Court of Appeals.

The case turns largely on a decree in another suit brought in 1907. In that suit a decree was rendered (1914) adjudging the Government to be the *equitable* owner of the lands. This was affirmed (1915) by the Eighth Circuit Court of Appeals.

The present bill alleges that during 1901-1904 the lands were certified to the State; that the State executed *contracts of sale* to Stanley B. Milner, Truth A. Milner, Harley O. Milner, and Samuel H. Gibson; that thereafter, in 1907 [1], the United States instituted suit against these parties and the Carbon County Land Company, assignee of the contracts, for the cancellation of the contracts, upon the ground that the lands were known mineral lands at the time of selection; that a decree was rendered (1914) adjudging the United States the *owner and entitled to possession*; that this decree was affirmed by the Circuit Court of Appeals in 1915; that the State was not made a party; that it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the State's agency in acquiring title and would conform its subsequent action to that determination; that the State has

[1] The transcript alleges 1927. This is apparently a clerical error. Both of the lower courts and all parties have assumed that 1907 was intended.

not seen fit to do so, but in 1920 issued its patent to the Carbon County Land Company, the same party to which the contracts had been assigned; that in doing so the State relied upon the fact that it had not parted with the legal title at the time of the rendition of the decree.

The bill, after alleging that the Independent Coal and Coke Company claims an interest in part of the lands and asking for discovery, concludes by an averment that the lands have already been determined by the District Court and by the Circuit Court of Appeals to be mineral lands and not subject to selection; that this question is *res adjudicata;* and that title has at all times been *equitably* in the United States.

The prayer is that inasmuch as the *State* has conveyed the *legal* title the Carbon County Land Company be adjudged to hold the title in trust for and convey to the United States; that it deliver up its patents, subject only to the *mortgage taken by the State* to secure the purchase price, which mortgage, unless the State will surrender its claim, will form the subject of an *independent suit between the plaintiff and the State in the Supreme Court of the United States;* and that defendants be enjoined from setting up any claim, etc.

Four matters are thus brought into distinct prominence:

(1) The absence of the State as a party in either suit.

(2) The passing of the legal title to the State in 1901-1904.

(3) The absence of any averment that the patent of 1920 from the State to the Carbon County Land Company was *under and pursuant* to the *contracts of sale* involved in the 1907 suit or in violation of the decree in that suit.

(4) The absence of any showing *why* the Independent Coal and Coke Company should, at the instigation of the plaintiff, submit its claim to the determination of the court.

The Circuit Court of Appeals said:

> "According to the charges in this complaint, the legal title passed through the State to that company (Carbon County Land Company) *after it was finally decided that as between appellant and Carbon County Land Company* all of the lands belonged to the United States and *its* title thereto was quieted as against *that* company. *Perforce that decree* Carbon County Land Company, in accepting a patent from the State, obtained *nothing* but the bare legal title. On the facts stated it acquired no beneficial interest in the lands as *against the United States*, and the purpose of this suit is to obtain a decree that it holds that title in trust for appellant and to compel it to convey the legal title to appellant.
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> . . .
>
> "If the *case stated in the bill* should be made out, it would seem clear that the relief sought should be granted, as to Carbon County Land Company, that it convey to appellant all of the lands title to which stood in its name when this suit was brought, and deliver to appellant any patent or other conveyance to it from the State; as to Independent Coal and Coke Company, that it make like conveyance of any of the lands conveyed to it, in which it acquired an interest *with notice of appellant's rights*, or without value."

The defendants contended before that Court:

(1) That inasmuch as the legal title *passed* to the State *when* the lands were certified, the State's title, although *voidable* on the ground of fraud, ripened into a good title at the end of six years; the pleadings *affirmatively* disclosing that the Government had knowledge of the fraud when it instituted the suit of 1907.

(2) That the Act of March 3, 1891, sec. 8, c. 561, 26 Stat. 1095, prescribing that suits to annul *patents* must be brought within six years, is applicable to suits to annul *certifications*.

(3) That the object of this suit is in reality to cancel the certification to the State, as much so as though a direct suit had been brought against the State.

(4) That although the decree rendered in the suit of 1907 was binding and unimpeachable, it did not prevent the acquisition afterwards from the State of a *new and later* title under a different agreement entered into long after the rendition and affirmance of that decree.

The Court of Appeals rejected the contention that the present suit is one to cancel the certification and therefore within the Act of March 3, 1891, *supra;* the Court saying that a suit to *impress a trust* is not within the Act and cannot be regarded as an attack on the *certification*.[1]

This Court, in *United States v. Whited and Wheless*, 246 U. S. 552, held that the Act of March 3, 1891, *supra*, does not bar a suit to recover damages for fraudulently inducing the Government to part with title. In the present case the decree, when rendered in conformity with the opinion of the Court of Appeals, will *disturb the title*. Its effect will be the same as *cancelling*

[1] Said the Court: " . . . . As to this suit, it is rather an *acceptance* of the Secretary's certification than an *attack* upon it."

the certification to the State. The doctrine of *United States v. Whited and Wheless, supra,* is that the *title* may not be disturbed after the expiration of the statutory period. The present suit has for its object the *disturbance of the title.* The opinion of the Court of Appeals amounts to an annihilation of the Statute.

The opinion of the Court of Appeals is predicated on one of two alternative propositions:

(1) The Court did not openly hold that the decree in the 1907 suit is binding on the State and its grantees; but this is the necessary effect of its opinion. In other words, that the question of title is *res adjudicata* as to the *State and its grantees* by virtue of that decree notwithstanding the *absence* of the *State* as a party to the suit.

(2) That although the State may have a *good* title on account of non-institution of suit within six years, the State is nevertheless powerless to convey to anyone having *knowledge* of the Government's rights. In short, that any one to whom the State may convey with *knowledge* of the decree rendered in the 1907 suit, holds the lands *in trust* for the United States. This is tantamount to saying that the State and its grantees are *bound* by that decree.

If the Court of Appeals intended, in accordance with the first proposition, to lay down the doctrine that the State's title became *res adjudicata* as to the State's *subsequent* grantees by virtue of the decree in the 1907 suit, then plainly its ruling cannot be upheld.

If that Court intended, in accordance with the second proposition, to lay down the doctrine that notwithstanding the State's title has become good by lapse of time anyone accepting a patent from it with *knowledge* of the Government's rights under the decree in the 1907 suit gets a title which the United States can take

away, then this doctrine finds no support in the decisions of this Court but is directly opposed to them.

We recognize the binding effect of the decree in the 1907 suit; but we say that when the State's title, voidable in the beginning, has ripened into a good title, the State possesses the right to convey; and this is true even though the conveyance be made to one whose contract of sale was cancelled in the 1907 suit. The decree in the 1907 suit, adjudging that as against the defendants *therein* the United States was the owner and entitled to possession, did not prevent the State, when its title became perfect, from conveying that title *even though its grantee was aware of that decree;* especially so where the conveyance was *not* made under the contracts of sale which that decree cancelled. The bill contains *no* allegation that the conveyance in 1920 from the State to the Carbon County Land Company was in *execution of the contracts of sale* which the decree in the 1907 suit cancelled and set aside. The plain inference from its allegations is that the patent of 1920 was executed pursuant to a *new* agreement.

The Court of Appeals said that this suit is in *aid* of the former decree and to obtain the *benefits* of that decree:

> "As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where *new interests arise* or where *relief of a different kind* from that obtainable under the first suit is required, and it may be filed either before or after a decree.
>
> . . .
>
> And the text of both authorities leaves no doubt

that on the facts here an assignee * of part may be joined as a party with his assignor."

We say that whether or not the suit is in aid of the former decree, and whether or not the bill is a supplemental one to obtain the benefits of that decree, does not alter the fundamental fact that if the State, by reason of not being a party to that suit, *ultimately* obtains a *good* title by lapse of time, the decree in the 1907 suit does not prevent the State from conveying that title, even to one whose contract of sale was cancelled in that suit. This is not flouting that decree. It is merely asserting that if a party to that suit gets a conveyance from the State *after* the latter's title has become perfect by reason of the Government's failure to bring the State into court, the decree in the 1907 suit is not *res adjudicata* as to this *newly-acquired title*.

The decree of the Court of Appeals is in effect final. True the defendants are given leave to answer, but the opinion says that *if* the case *stated in the bill* should be made out the Government is entitled to prevail. The only defense open to the defendants is presented on this record.

Finally, the bill contains a statement that unless the State surrenders its claim the Government will file *an original suit in this Court against the State* on account of the mortgage given to secure the purchase price. The Court of Appeals does not in so many words say that the State could not have conveyed to *someone else*, but if its opinion is to be interpreted as meaning that the State, although at liberty to convey to *others*, could

* Meaning apparently the Independent Coal and Coke Company.

not convey to any of the *defendants* in the 1907 suit, this means that in a suit like the present one the United States would be defeated *if* conveyance had been made to *others*, but is entitled to prevail here *because* the State has conveyed to a party to the 1907 suit. If the United States can, in this indirect way, strike down the State's title, the strange incongruity is presented of the State getting a good or a bad mortgage dependent on the party to whom it conveys. If the United States is going to bring an original suit against the State in this Court necessarily the same questions involved in this suit will be involved in that.

The reasons why the writ should issue are:

(1) The holding of the Court of Appeals that the Act of March 3, 1891, *supra*, prescribing a six-year period of limitation, can be circumvented by a suit to impress a trust, is probably in conflict with applicable decisions of this Court. In any event this important question of federal law should be settled.

(2) If this Court should disagree with the above holding the question will then arise whether a suit to cancel a certification as distinguished from a patent is barred by the Act mentioned. The holding of the Court of Appeals that the statute does not embrace a suit to impress a trust made a ruling on this matter unnecessary. The Government contends that the remarks in *United States v. Winona and St. Peter R. Co.*, 165 U. S. 463, are *dicta*. This important question of federal law should be settled.

(3) The holding of the Court of Appeals that a decree adjudicating ownership prevents a party from thereafter setting up a *newly* acquired title is in conflict with applicable decisions of this Court.

(4) If an original bill is filed in this Court by the Government to adjudicate the mortgage of the State unless the latter renounces, that suit will necessarily involve the same questions of title. The possibility of conflicting adjudications is apparent.

The petitioners accordingly pray that this Court grant certiorari to the Eighth Circuit Court of Appeals requiring the record in this case to be brought to this Court for such proceedings as may be proper.

WILLIAM D. RITER,
Attorney for Independent Coal and Coke Company.

FRANK K. NEBEKER,
Attorney for Carbon County Land Company.

SUPPORTING BRIEF.

A suit to cancel a certification is a suit to cancel a patent within the meaning of the Act of March 3, 1891, sec. 8, c. 561, 26 Stat. 1095, prescribing a six-year period.

United States v. Winona & St. Peter R. Co., 165 U. S. 463.

Cole v. State of Washington, 37 L. D. 387.

Cf. Stockley v. United States, 260 U. S. 532.

The statute is no bar where the Government brings suit to protect the rights of third parties. *United States v. New Orleans Pacific Ry.*, 248 U. S. 507; *Cramer v. United States*, 261 U. S. 219. Nor where the suit is to declare a forfeiture because of breach of a condition subsequent. *Kern River Company v. United States*, 257 U. S. 147. But this suit is not of that character.

A suit to impress a trust and compel a conveyance is a disturbance of the title. A suit which has for its object the disturbance of the title is barred if not begun within the statutory period.

United States v. Whited and Wheless, 246 U. S. 552.

Cf. United States v. Bellingham Bay Improvement Co., 6 Fed. (2d) 102.

The opinion of the Court of Appeals amounts to an annihilation of the statute. It cannot be thus stricken down by resorting to the device of impressing a trust.

Elmendorf v. Taylor, 10 Wheat. 176.
Miller v. McIntyre, 6 Pet. 66.
Beaubien v. Beaubien, 23 How. 207.

The decree rendered in the 1907 suit is obviously not binding on the State and its subsequent grantees.

Brandon v. Ard, 211 U. S. 11, *et passim*.

This Court has with emphasis said that a decree rendered in a suit brought against a grantor *after* he has parted with title is not binding on the grantee. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464. The facts in the present case render this doctrine equally applicable.

A decree can be res adjudicata only as to matters actually decided or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

Obviously a title acquired after the rendition of a decree, such as title under adverse occupancy begun after the decree, could not possibly be adjudicated by such decree. The title acquired by the Carbon County Land Company in 1920 could not have been adjudicated in the 1907 suit for the title was not then in existence.

This Court has distinctly recognized that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a newly acquired title.

Barrows v. Kindred, 4 Wall. 399.
Merryman v. Bourne, 9 Wall. 592.

United States v. Southern Pacific R. R. Co., 223 U. S. 565.

Under these cases the Carbon County Land Company, although a party to the 1907 suit, was within its rights in acquiring a new title from the State in 1920.

WILLIAM D. RITER,
Attorney for Independent Coal and Coke Company.
FRANK K. NEBEKER,
Attorney for Carbon County Land Company.

SUBJECT INDEX

TABLE OF CASES

STATUTE CITED

[redacted]

[redacted]

In the Supreme Court of the United States

[redacted]

October Term, 1936

[redacted]

INDEPENDENT COAL AND COKE COMPANY, and CARBON COUNTY LAND COMPANY,

[redacted]

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

[redacted]

[redacted] OF INDEPENDENT COAL AND COKE COMPANY [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

SUBJECT INDEX OF BRIEF.

CERTIORARI.

Question involved: Sufficiency of Complaint.

I.

COMPLAINT.

II.

MOTION OF DEFENDANTS TO DISMISS AND PROCEEDINGS IN LOWER COURTS.

III.

LAW POINTS OF INDEPENDENT COAL & COKE COMPANY.

INDEX (Continued)

LIST OF AUTHORITIES

TEXT BOOKS

In the Supreme Court of the United States

October Term, 1926

INDEPENDENT COAL AND COKE COMPANY and CARBON COUNTY LAND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

BRIEF OF INDEPENDENT COAL AND COKE COMPANY ON WRIT OF CERTIORARI.

STATEMENT.

This Court has issued its writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of the United States District Court for the District of Utah.

The United States of America filed its bill in equity on May 16, 1924 in the United States District Court for the District of Utah, instituting the action which resulted in the judgment of the District Court. That judgment was based upon the complaint and the defendants' motions to dismiss, and the questions involved in this review relate entirely to the sufficiency of the complaint.

It is, therefore, important that the contents of the complaint should be fully stated. That complaint alleges:

That during the years 1901 to 1904 there was certified to the State of Utah, under certain grants made to the State by the Act of July 16, 1894, certain described lands, and that the State of Utah executed contracts of sale to said lands to Stanley B. Milner, Truth A. Milner, Harley O. Milner and Samuel H. Gibson.

That in the month of January, 1907, a suit was instituted in the United States District Court for the District of Utah against said individuals and the Carbon County Land Com-

pany, as assignee of said individuals "for the cancellation of said contracts of sale upon the ground that said lands were mineral lands and were known to be such at the time of their selection by the State; that said suit was tried on the merits, testimony was taken," and on June 8, 1914, a decree was entered in the District Court of the United States for the District of Utah cancelling said contracts and adjudging that the United States of America was the true and lawful owner of the said lands and quieting the title of the United States to said lands as against the said defendants (R. 2-4). (This decree is set out in *haec verba.*)

It is further alleged that this decision was affirmed on appeal by the Circuit Court of Appeals on November 15, 1915, (See 228 Fed. 431) and a copy of the opinion of the Circuit Court of Appeals is attached to the complaint as an exhibit and made a part of the bill (R. 4).

The complaint then alleges (P. 5, R. 4) that the State of Utah was not made a party to said suit, "and it was believed by the plaintiff that the State would leave to the determination of the Courts, the questions of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination." (See 138 U. S. 514).

The complaint further alleges (P. 6) that the State of Utah has not seen fit to conform its subsequent action to the determination of the Courts, but, on the contrary, on February 10, 1920, the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the before mentioned suit.

Paragraph 7 of the complaint reads as follows:

> "The Independent Coal & Coke Company, a corporation, claims an interest in Section three (3) and the North half (½) of Section ten (10) in Township thirteen (13) South, Range ten (10) East, the full nature and extent of which is unknown to plaintiff, and in respect of which a full discovery is asked of that defendant." (R. 4).

This is the only paragraph that makes any charge against the Independent Coal and Coke Company.

Paragraph 8 alleges that Carbon County is made a defendant for the reason that it claims a part of said land under a purported tax sale in the year 1921. Plaintiff avers that the lands, being property of the United States, were not subject to taxation.

Paragraph 9 alleges:

> "The plaintiff avers that said lands have already been determined to be mineral lands and as such not subject to selection by the State, both by the decision of this Court and the Circuit Court of Appeals, and this question is, therefore, *res judicata*." (R. 5).

Paragraph 10 reads:

> "The plaintiff further avers that at all times the title to said lands has been equitably in the United States."

The prayer of the complaint reads as follows:

> "Wherefore, and now that the State of Utah has conveyed the legal title to said lands to the said defendant, Carbon County Land Company, the plaintiff prays that the defendant be adjudged and decreed to hold whatever title they have to the said lands in trust for the plaintiff, and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession, subject only to the mortgage taken by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States; and that the defendants be restrained and enjoined from hereafter setting up any claim of title to said lands, or any part thereof, or in any manner inter-meddling therewith, or in removing any coal or other product therefrom; and may it please Your Honor to grant unto the plaintiff a Writ of Subpœna to be directed to the said Carbon County Land Company, the Independent Coal and Coke Company, and Carbon County thereby commanding them at a certain time and under certain penalty therein to be limited, personally to appear before this Court and then and there full, true, direct and perfect answer make to all and singular the premises,

but not under oath, answer under oath being hereby especially waived, and further to stand to perform and abide by such further order, direction and decree herein, as to this Honorable Court shall seem agreeable to equity and good conscience." (R. 5).

To this complaint each of the defendants, Carbon County Land Company, Independent Coal and Coke Company and Carbon County made two motions: One to strike the allegations contained in Paragraph 5 of the bill and the allegations contained in Paragraph 9, and the other to dismiss the complaint on two grounds: (1) That said bill of complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. (2) That it affirmatively appears from the face of the complaint that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause of action accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the statute of limitations, made and enacted by the Federal Congress of the United States Government controlling and governing such causes of action as are attempted to be stated in the bill of complaint; said Federal Statute being Section 8 of the Act of March 3, 1891, Chapter 561.

The United States District Court sustained the motions to dismiss on December 17, 1924, and gave to the plaintiff thirty days within which to amend. The plaintiff did not amend and the decree dismissing the bill with prejudice was entered in the United States District Court on January 21, 1925. Thereafter, the Circuit Court of Appeals reversed said judgment (R. 35-36).

The Petitioner, Independent Coal and Coke Company, contends:

1. That the complaint does not state facts sufficient to constitute a cause of action as against it in favor of the Government.

2. That the legal title to the land involved passed to the State when the lands were certified, and that the State's title, even assuming it to be voidable on the ground of fraud, ripened into a good title at the end of six years after the Government had knowledge of the fraud, if any existed; that it must be conclusively presumed that the Government had knowledge of this fraud when it instituted the suit of 1907.

3. That the Act of March 3, 1891, (Sec. 8, Chapter 561, 26 Stat. 1095) prescribing that suits to annul patents must be brought within six years, is applicable to suits to annul certifications; that certifications and patents are synonymous within the meaning of this statute. (Winona case).

4. That the object of this suit is in reality to cancel the certification to the State, as much so as though a direct suit had been brought against the State.

5. That neither the State nor its successors in interest are precluded from invoking the statute of limitations by the claim of the Government that the State and its grantees are constructive trustees; said State and its grantees would be trustees, if at all, against their wills and without their consent, and the statute of limitations functions to the same extent as it would function if it were the direct purpose of the action to vacate or annul the patent.

6. That though the decree rendered in the suit of 1907 was binding and unimpeachable as to the parties to that suit and their privies, it did not prevent the acquisition afterwards from the State of a *new and later* title under a different agreement entered into long after the rendition and affirmance of that decree.

7. That the bill of complaint in this action is an original one and not, in any sense, supplemental; but, even if considered supplemental in its nature, still this Court may consider intervening changes of circumstances affecting the justice of enforcing the decree as rendered.

ARGUMENT.

I. *The Complaint Does Not State Facts Sufficient to Constitute a Cause of Action Against the Independent Coal and Coke Company and in Favor of the Government.*

The Circuit Court of Appeals, in its opinion in the case at bar, said:

> "The suit is in aid of the former decree, to obtain the benefits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root vs.

Woolworth, 150 U. S. 401; Shields vs. Thomas, 18 How. 253, 262; Thompson vs. Maxwell, 95 U. S. 391, 399; Story's Equity Pleadings, Secs. 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleading says (p. 74):

"'But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * *' (75). But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill.'

"The same authority, on page 98, in reference to bills, not original, to carry on decree into effect, says:

"'The necessity for this kind of bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * * * it may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer.'

"And the text of both authorities leaves no doubt that on the facts here an assignee of part may be joined as a party with his assignor."

This Petitioner submits that said Circuit Court of Appeals misapprehended the nature of the case before it, not only as to this *particular petitioner*, but as to *all* of the defendants.

In the suit of 1907 the Government sought to, and did, set aside certain contracts which the Milners and their associates had obtained from the State of Utah. In those contracts said individuals had agreed to pay for the lands, the price of $1.50 per acre, payable in ten annual installments (R. 12); the applications to purchase showed that the lands were of a non-mineral character (R. 13); the State of Utah was not, in any sense, a party to that suit of 1907; and the title held by the State, if title it had, was not affected by that suit of 1907, or the decree entered therein. The subject mat-

ter of that suit was the contracts obtained by the Milners and their associates from the State.

This suit is in direct contrast with the suit of 1907. This suit is based upon the assumption of fact that the State has "conveyed the legal title to said land" (see prayer of complaint) to the defendants involved in this suit and the Government seeks to re-obtain that title which the State obtained by the certifications. This suit is to establish a trust and have the grantees of the State ordered to convey to the Government the title to the lands which the State has had since the dates of certifications in 1901 and 1904. The subject matter of this suit is the title that was conveyed by the Government to the State by those certifications; that subject matter was unaffected by the suit of 1907. It could not have been affected, because the State was not a party to that suit.

If the State of Utah had conveyed this land to an entire stranger to the suit of 1907, the questions involved would be identical with those which are presented by this record.

It is admitted by the Bill of Complaint in this action that the title of the State of Utah was not litigated in the suit of 1907, and it is admitted in the Bill of Complaint that the Carbon County Land Company claims as a grantee of the State holding whatever title the State had to convey, not by reason of the contracts which were annulled in the suit of 1907, but by reason of *a new and independent transaction* which took place in 1920 between the State of Utah and the Carbon County Land Company.

The mere fact that the Carbon County Land Company was the defendant in the suit of 1907 cannot alter the situation, it is submitted, in the slightest particular.

We assume that it will not be contended that the Carbon County Land Company could not acquire these lands in some *new and independent* transaction; that the transaction was new and independent, is clear from the record in this case and from the Bill of Complaint.

As to the defendant, Independent Coal and Coke Company, there is not one word in the Bill of Complaint in this action which shows or tends to show, that the Independent Coal and Coke Company derived its title either from the Carbon County Land Company or from the State of Utah.

The Bill of Complaint is silent upon the subject of *privity*. The Independent Coal and Coke Company was not a party

to the suit of 1907. The only thing that is alleged in the Bill as against the Independent Coal and Coke Company is that it claims an interest in Section 3 and the North half of Section 10, the full nature and extent of which is unknown to the plaintiff. (Par. 7, R 4.)

The Circuit Court of Appeals, in its Opinion, has assumed a fact *not alleged in the Complaint*, namely, that the Independent Coal and Coke Company is an assignee of the Carbon County Land Company. The allegations of the Government, as against the Independent Coal and Coke Company, are not sufficient to entitle the Government to any relief. They certainly do not show that the Independent Coal and Coke Company is a constructive trustee.

The Bill of Complaint is not a good bill of peace against the Independent Coal and Coke Company. Neither is it sufficient as a suit to quiet title. No fact is alleged which shows the *invalidity* or even the *adverse* character of the Independent Coal and Coke Company's claim to an interest in the land involved or in any part of that land. It is true that the Government says in its Bill of Complaint (P. 9) that the lands have been determined to be mineral lands, and as such not subject to selection by the State, and that this question is therefore res judicata (R. 5).

We may assume, for the purpose of argument, that the mineral character of the lands was determined by the decree entered in the suit of 1907, but that did not affect the State's interest in the land because the State was not a party to that suit and could not have been made a party because the State could be sued only in the United States Supreme Court.

How, then, can it be said that the question is res judicata *of* anything in the case at bar?

The decree entered in the suit of 1907 could only adjudicate the matters litigated as to the persons who were *parties* to that suit, or as to *persons* claiming under such *parties*. The State of Utah was not a party; the Independent Coal and Coke Company was not a party; and no allegation can be found in the Complaint from which the inference can be drawn that the Independent Coal and Coke Company was in *privity* with any party.

It may be said that the motion filed by the State of Utah in this Court, with its accompanying suggestions, shows that the Independent Coal and Coke Company acquired its interest

in the lands from the State of Utah through the Carbon County Land Company, but even that acquisition does not bring the Independent Coal and Coke Company into privity with the decree entered in the suit of 1907. Assuming that the suggestion of the State showing this fact *may supply the want of allegation* in the Complaint in the case at bar, still we find that the Carbon County Land Company was engaged in a new transaction with the State and as a result of that new transaction it acquired these lands and pursuant to that acquisition it conveyed 1120 acres to the Independent Coal and Coke Company.

It is submitted that such a transaction is not, in any manner, affected by the decree made and entered in the suit of 1907.

If the decree in that suit is res judicata of all the matters and things involved in this suit, then the necessity for this suit does not appear.

CONTENTION NO. 2

The Legal Title to the Land Involved Passed to the State when Lands were Certified, and the State's Title, even Assuming it to have been Voidable on the Ground of Fraud, Ripened into a Good Title at the End of 6 Years After the Government had Knowledge of the Fraud, if any Existed: That it must be Conclusively Presumed that the Government had Knowledge of this Fraud When it Instituted the Suit of 1907.

The Act of March 3, 1891, reads as follows: Section 8.

> "Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (26 Stat. 1099)."

In the case at bar the United States Circuit Court of Appeals said:

> "We think a mere reading of the bill demonstrates that view is a misconception. As to this suit, it is rather an acceptance of the Secretary's certification than an attack upon it. The Act of March 3,

> 1891, provides that suits to vacate and annul patents shall only be brought within six years after the date of the issuance of such patents. This suit was not brought to vacate and annul the Secretary's certificate. That is no part of its purpose. No such relief is sought. We think the statute relied on has no application to this case." (9 Fed. 2d. 517-518).

From this quotation it is plain that the Court of Appeals refused to apply the Act of March 3, 1891, because the Government in this suit undertook to have the defendants declared *constructive trustees*.

It is submitted on the part of the defendants that the Court of Appeals was in error when it held that the effect of the Act of March 3, 1891, could be avoided by bringing a suit to establish a constructive trust instead of by bringing the suit to vacate or annul a patent or a certificate.

These defendants are trustees, if at all, against their wills and without their consent. Under such circumstances the statute of limitations functions to the same extent as it would function if it were the direct purpose of the action to vacate or annul the patent. Neither the State nor its grantees can be precluded from invoking the statute of limitations by the fact that said State and its grantees are claimed to be constructive trustees.

Newsome v. Board, 103 Ind. 526; 3 NE. 162.

This case was decided by the Supreme Court of Indiana, November 4, 1885. Mr. Justice Elliott rendered the opinion. The syllabi reads as follows:

> "It is only to pure or direct trusts that the rule preventing the defense of the statute of limitations applies, and in cases where the jurisdiction of courts of equity and courts of law is concurrant, the statute of limitations will run."

In the course of Opinion he says:

> "It would certainly be a strange rule that would make the operation of the statute depend simply upon the character of the remedy adopted or the nature of the forum chosen and the law is not subject to the reproach of sacrificing a substantial right to the mere form of the remedy selected by the complainant."

This Court, from an early date, has applied the statute of limitations to implied or constructive trusts, and such application of the statute to such trusts cannot be avoided, either on principle or on authority.

Elmendorf v. Taylor, 10 Wheaton, 152; 6 L. Ed. 289

decided by the Supreme Court of the United States in 1825. Mr. Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, 'strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who are not permitted to do anything adverse to it.' They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

Speidel v. Henrica, 120 U. S. 377; 30 L. Ed. 718 decided by this Court in 1886. In the opinion of Mr. Justice Gray it is said:

> "In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law." (Citing authorities.)

Stillwater Railroad Co. v. Stillwater, 66 Minn. 178; 68 N. W. 837.

decided by the Supreme Court of Minnesota on November 9, 1896. In this case the Supreme Court of Minnesota was construing the Statutes of Limitations of that state and their application to the cause before the Court. It said:

> "This statute, like the equity rule which it follows, applies only to express, technical, and continuing trusts, of the kind which were cognizable exclusively in a court of equity, and of which the cases of Smith v. Glover, 44 Minn. 260, 46 N. W. 406, and Donahue v. Quackenbush (Minn.) 64 N. W. 141, relied on by the plaintiff, are examples. It has no application to

> cases of implied trusts and those which the law forces on a party. In such cases, of which the case at bar is an example, the statute of limitations runs from the time the act was done by which the party became chargeable as trustee by implication; that is, from the time when the cestui que trust could have enforced his right of suit. 'If the statute were not permitted to operate when an implied trust exists, the exceptions would be endless, as in fact every case of deposit or bailment in a certain sense creates a trust, and the instances in which an implied trust may be raised are almost innumerable.' 2 Wood Lim. Sec. 200." (Citing authorities.)

Miller v. McIntyre, 6 Peters, 66; 8 L. Ed. 320.

decided by this Court in 1832. Mr. Justice M'Lean said:

> "From the above authorities it appears that the rule is well settled, both in England and in this country, that effect will be given to the statute of limitations in equity the same as at law."

Beaubein v. Beaubein, 23 How. 207; 16 L. Ed. 190.

decided by this Court in 1859. Mr. Justice Nelson said:

> "The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations." (Citing authorities.)

Detroit Trust Co. v. Goodrich, 176 Mich. 168; 141 N. W. 882; Ann. Cases 1915-A, 821.

decided by Michigan Supreme Court May 28, 1913. After stating the rule that express trusts are not within the Statute of Limitations, the Court said:

> "But a lapse of time is as complete a bar to a constructive or implied trust in equity as at law unless there has been a fraudulent concealment of the cause of action." (Citing authorities.)

Carroll v. Greene, 92 U. S. 509; 23 L. Ed. 738

decided by this Court in 1875.

In that case this Court looked at the substance of the action rather than its form and applied the statute to a case stated in a bill in equity.

What is the substance of this action, if not to destroy the title of the State and its grantees?

Whenever a grantor seeks to have a fraudulent grantee declared a constructive trustee, he must allege and prove all of the facts that would be essential to the annulment or vacation of the grant made by him to such grantee. Equity simply affords him an additional remedy and permits him to have such grantee declared a constructive trustee, but before such a declaration can be made by any court of equity it must annul and vacate the grant made. If the relief prayed for in this bill is to be allowed by the Courts, the granting of that relief necessarily vacates and annuls the certificates. The rights of the parties, it is submitted, cannot be affected by the Government availing itself of the remedy which results in declaring the State and its grantees constructive trustees. In the language of the decisions such an evasion or annihilation of the statute would be a reproach to our system of jurisprudence.

DOES THE STATUTE APPLY?

It appears from the record that the certifications were made by the Secretary of Interior in the years 1901 and 1904; that in 1907 the Government brought a suit in the United States Court to annul the *contracts* entered into by the Milners with the State of Utah upon the ground of fraud. It ought to be accepted that the Government had knowledge of the fraud at the time this suit was instituted in 1907. This suit resulted in the judgment of 1914, which was affirmed by the Circuit Court of Appeals in 1915, and the *contracts* entered into by the Milners with the State of Utah ceased to exist. The State of Utah was not a party to that suit. *No action was taken by the Government to annul or re-obtain the legal title held by the State.* On February 10, 1920, the State conveyed those lands to the Carbon County Land Company by virtue of an entirely *new and independent transaction.* The State now holds a mortgage on those lands for $556,428.

The present action was not instituted by the Government until May 16, 1924. Twenty years had run from the date of the last certification until the commencement of this suit. Ap-

proximately seventeen years had run between the time of the commencement of the suit of 1907 and the commencement of the present suit in 1924. Approximately ten years had run between the decree of the District Court in 1914 and the commencement of this suit. It is submitted that Section 8 of the Act of March 3, 1891, applies to the certification with the same force that it would apply to a formal patent. The bringing of this suit is a confession on the part of the Government that the title was held by the State until February 10, 1920. The statement contained in the prayer of the bill in this suit that an action will be brought against the State is a conclusive concession on the part of the Government that the State has an interest in this land. The statute says that:

> "Suits to vacate and annul patents * * * shall only be brought within six years after the date of the issuance of such patents."

If these certifications made by the Government to the State have the same legal effect as patents, then it is submitted that this suit is barred by Section 8 of the Act of March 3, 1891.

> United States v. Winona Railroad Co., 67 Fed. 948.

decided by the Circuit Court of Appeals, Eighth Circuit, May 6, 1895. In that case Mr. Circuit Judge Sanborn, speaking for himself and Circuit Judges Thayer and Caldwell, said:

> "The certificates were evidence that the officers of the Land Department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy and their legal effect was the same as though patents to the State had been issued for the benefit of that Company."

And again:

> "A certificate or patent is the record evidence of the judgment of this tribunal and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department it is like the judgment of other special tribunals vested with judicial powers impervious to collateral attack."

The entire opinion shows that the words "patent" and "certificate" are in law synonomous. It was held by the Circuit Court of Appeals in the Winona case above cited that the certificates of the Land Department were not absolutely void but merely voidable and that they conveyed the legal title to the State and its grantees.

It appears that the case decided by the Eighth Circuit was appealed to this Court.

> United States v. Winona Railroad Co. 165 U. S. 463; 41 L. Ed. 789.

decided on February 15, 1897. In the course of his opinion, speaking for a unanimous court, Mr. Justice Brewer pointed out that by Section 1 and 2 of the Act of 1887, the Attorney General was authorized to commence proceedings to cancel all patents, certifications or other evidences of title found to have been erroneously issued in the adjustment of railroad land grants; and he further says in substance if these two sections of the Act of 1887 were all the legislation of Congress bearing upon the subject, then lapse of time would not be a bar as against the Government to the maintenance of such actions. He then points out that on March 3, 1891, Congress enacted the statute now under consideration, providing that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued, such suits should only be brought within six years after the date of issue.

The learned Justice appreciated the fact that the appellees in the Winona case could not avail themselves of the limitations contained in the Act of 1891 because the suit was instituted by the Government before the expiration of the time prescribed in the statute. He then refers to the fact that on March 2, 1896 (which was after the decision of the Circuit Court of Appeals of the Eighth Circuit), Congress passed a further Act (29 Stat. at Large 42, Chapter 39), extending the period of limitations, but following that extension with this provision:

> "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled but the right and title of such purchaser is hereby confirmed."

He says:

> "It is true that this Act was passed after the commencement of this suit—indeed, after the decision of the Court of Appeals—but it is none the less an Act to be considered."

And again he says:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896 to confirm the title in this case passed by certification to the State."

It not only declares that no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but it confirms the title of such purchasers.

This decision of this Court applies the identical legislation, for the legislation of 1896 was but a complement to the Act of 1891, to *certifications* as well as to patents. If there had been any legal distinction between the two words, then it is submitted that this Court could not have applied the sentence quoted from the Act of 1896, because it was undisputed that the appellees had obtained whatever title they had by means of certifications of the Land Department to the State of Minnesota.

Congress could have had no purpose in making a distinction between a formal patent and a certification. The one conveys the title to the land of the Government as effectively as the other. The mere fact that one is a trifle more formal than the other does not in any manner justify a distinction such as is attempted in the case at bar.

Langdeau v. Hanes, 21 Wallace, 521; 22 L. Ed. 606,

decided on February 15, 1875. In that case Mr. Justice Field used the following language:

> "In the legislation of Congress a patent has a double operation. It is a conveyance by the Government when the Government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evi-

> dence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the Government."

And, again, he says:

> "The whole error of the plaintiff arises from his theory that the fee to the land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants."

Applying the definition of Mr. Justice Field to Section 8 of the Act of March 3, 1891, and it must be clear that Congress used the word "patent" in its broadest sense. Surely Congress was not referring to any mere written document or instrument bearing the name "patent." The legislation was passed for the purpose of permitting the Government to re-obtain its title to lands which had been erroneously or wrongfully granted, and at the same time it was undertaking to accomplish that "benign purpose" (quoting from J. Brewer in Winona case) of giving security and certainty of title to its citizens who might invest in lands previously owned by it. It was fixing a time when no mere errors or irregularities or alleged frauds or misrepresentations should be open for consideration to disturb the holders of the title to land.

It is not believed that anyone can attribute to Congress the purpose of merely striking at the *written* document in its aspect as evidence of a grant. This legislation struck at the grant itself, and that grant could have been made either by means of a certification or by means of a formal instrument signed by the President. As was said by this Court in

Shaw v. Kellogg, 170 U. S. 312; 42 L. Ed. 1050

> "There is no magic in the word 'patent' or in the instrument which it defines."

This was the language of Mr. Justice Brewer, used in 1898. It is persuasive as to the effect of the opinion of the same justice rendered in the Winona case, upon which these

petitioners rely. The Land Department of the United States has construed the Winona case according to our contention.

Cole v. State of Washington, 37 L. D. 387

decided by First Assistant Secretary Pierce on January 8, 1909.

It was there held:

> "The certification of lands under a grant that does not require a patent is equivalent to a patent and the validity of such certification can be questioned only in the courts, subject to the same limitations with respect to time in which suits may be instituted as Government suits to cancel patents."

We readily concede that the statute under consideration is no bar where the Government brings a suit to protect the rights of third parties, nor where it brings a suit to declare a forfeiture because of a breach of a condition subsequent.

United States v. New Orleans Pacific Railway Co., 248 U. S. 507
Cramer v. United States, 261 U. S. 219
Kern River Co. v. United States, 257 U. S. 147
United States v. LaRoque, 198 Fed. 645

(Decided by the Circuit Court of Appeals, Eighth Circuit, July 8, 1912.) It is plain from this decision that what are referred to in some of the cases cited as "trust patents" do not come within the terms of Section 8 of the Act of March 3, 1891.

Lands, the legal title to which remains in the United States in trust for Indians or other wards of the Government, are exempted from the operation of this Act, but lands which have been granted by the Government to individuals with the intention of conveying title to the grantees, with the intention of surrendering the absolute ownership of the Government so that such lands can be sold by the grantee and purchased by other persons, come squarely and directly within the purpose of the legislation of 1887, 1891 and 1896. If a distinction is to be made in the application of this statute as between lands granted by means of a certificate and lands granted by means of a formal patent, signed by the President,

then, indeed, Congress cured only a portion of the evil at which it struck in the legislation referred to. It is not believed that this Court can attribute to the Federal Congress any such an intent.

In the case of Shaw v. Kellogg, 170 U. S. 312, this Court said, in reference to legislative grants, quoting from Winona v. Barden, 113 U. S. 618:

> "They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instrument of private conveyance To ascertain that intent we must look into the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

And again:

> "It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future."

And again:

> "But, it is said, no patent was issued in this case, and therefore the holding in the Barden case, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. *There is no magic in the word 'patent' or in the instrument which the word defines.* By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, *the same result* follows as though a formal patent were issued."

And again:

> "In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in fact refused, and when the title passed the same as though

> a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land."

It occurs to the writer of this brief that in this legislation of which Section 8 of the Act of March 3, 1891, is a part, Congress was undertaking to give relief as against the almost intolerable condition which existed in the public land states. It attempted to fix a time when suits could be brought by the Government for the purpose of re-obtaining title to lands which had passed from the Government. Any suit which had for its object the disturbance of that title on the ground of fraud or irregularity was barred, if not begun within the statutory period, so that the Government could not re-obtain the title. It was not a matter of any importance so far as the evil was concerned, whether the title had passed from the Government by an instrument signed by the President or by means of an instrument which was certified by the Secretary of the Interior. The evil in one case was as great as the evil in the other, and it does not seem to be fair to attribute to Congress the intent to correct only a part of this evil.

It is therefore submitted that the opinion of the Circuit Court of Appeals amounts to an annihilation of the statute. So far as that opinion is concerned it could as well be applied to a formal patent as it could be to a certification. It suggests an additional way of avoiding the statute for, if the contentions of the Government in the case at bar are sound, the statute can be avoided by granting land by means of a certificate, or if that land is granted by means of a formal patent, then by bringing a suit to have the fraudulent grantee or his successors in interest declared constructive trustees.

In the late case of

> United States v. Oregon Lumber Co., 260 U. S. 290; 67 L. Ed. 261

this Court said:

> "The defense of the Statute of Limitations is not technical but substantial and meritorious."

3 Holdsworth P. 94, see appendix.

Mr. Holdsworth has said, in discussing the subject of seisin, that it gives the best title known to English law and English lawyers. Now, title rests upon seisin. If anyone is

possessed of a piece of land he is entitled to hold it until someone can take it away from him by means of the strength of the latters own title. In this Oregon Lumber case this Court held:

> "The United States may either disaffirm a patent for public lands acquired by fraud under the Timber and Stone Act or it may affirm the transaction and recover damages for fraud, but it cannot do both."

And in the case of

> United States v. Whited, 246 U. S. 552; 62 L. Ed. 879

This Court, speaking by Mr. Justice Clark, held that the Statute of Limitations barred only one of these remedies; that the United States had two remedies, one to annul the patent and the other to affirm the patent and recover the value of the land.

If the opinion of the Circuit Court of Appeals is to be sustained, one would come to the conclusion that the United States has three remedies—one to annul the patent—which may be barred in six years after the issuance of the patent; the other to affirm the patent and sue for the value of the land against which no statute appears to run, *and the other to affirm the patent or certificate and sue to have the holder of the title declared to be the Government's constructive trustee.* And to these may be added that if this title has been transferred through the agency of the Secretary of the Interior, by means of a certificate, instead of through the agency of the President by means of a formal patent, then no Statute of Limitations exists, and the ownership of all lands thus acquired by means of certifications is subject to an attack by the Government, without limitation as to time or circumstance. (Such is the opinion of Court of Appeals.)

For reasons of public policy such a construction of the legislation under consideration should be avoided, if it can be without doing any violence to settled principles.

In the brief of the Government filed in this court in opposition to the petitioners' application for a writ of certiorari, it was said that the matters involved in the suit of 1907 were res adjudicata; that the former adjudication of June 8, 1914, determined, as between the United States and the as-

signees of the State, that the State had obtained no title by the certification, and that the United States was the owner of the land. If this statement made by counsel for the Government is true, then it would seem that this entire suit of 1924 was wholly unnecessary. If the whole matter was adjudicated by the decree of 1914, if that took away the title of the State, *then why is this suit being litigated?*

In the case of

Williams v. United States, 138 U. S. 514

this Court said:

> "It cannot be doubted that the certification operated to transfer the legal title to the State."

It is upon that authority that the Government relied for the bringing of this suit. Paragraph 5 of the complaint has been taken bodily from the opinion of the Court in the Williams case. It in substance says that it was believed the State would convey the land to the Government in accord with the determination of the Courts, but the State of Utah did not re-convey this land to the Government and the United States did nothing whatsoever to obtain such re-conveyance for ten years after the decree of 1914. In the meantime the title of the State became absolute and being absolute, it sold the land to private owners. *It did not flout the decree of the United States District Court or of the United States Circuit Court of Appeals.* The Carbon County Land Company, in an entirely new transaction, bought the land from the State and agreed to pay One Hundred Dollars an acre therefor. The title which the Carbon County Land Company got was a title which had never been litigated. It was the title which the State held ever since the years 1901 and 1904, and which between those years and the year 1924, when this suit was brought, had become invulnerable as against any attack by the Government.

It is submitted that it would be a great wrong for the Government to permit the title to this land to remain vested in the State, so that it could be sold, and then attack that title after sale by the State. The position of the Independent Coal & Coke Company is illustrative of this wrong. It is engaged in the mining of coal. The eleven hundred twenty acres which it acquired were so situated that the Independent Coal & Coke Company was practically compelled to buy, *if that eleven hundred twenty acres was to be the subject of private ownership.* Can it be that this land could be sold time and again, and that

the validity of the title to it should forever depend upon whether the Government saw fit to bring a suit or not?

But the intimation is very strong from the opinion of the Circuit Court of Appeals that the State of Utah could have conveyed this land to someone other than the Carbon County Land Company. The writer does not believe that such an interpretation of the opinion is unjust to the Court of Appeals. If the opinion is correctly interpreted by the writer, then it means that the Carbon County Land Company was in some way or other perpetually enjoined from acquiring this land in *any* transaction, however independent that transaction might have been from the one annulled in the suit of 1907.

It is submitted that if the Government can in this indirect way strike down the State's title the strange incongruity is presented of the State getting a good or bad mortgage, dependent on the party to whom it conveys. And it is further submitted that the Carbon County Land Company can be ignored in and so far as the Independent Coal & Coke Company is concerned, for it seems from the suggestions made by the State in its application to be heard before this Court that the Independent Coal & Coke Company has come into direct relation with the State: (See suggestions of State, R. 3.) and that the Independent Coal & Coke Company has assumed and agreed to pay to the State $112,000 of the mortgage indebtedness due to the State. Surely no one would contend that the invalidity of the State's mortgage could be found from the fact that the State sold the land on February 10, 1920, to the Carbon County Land Company.

It is submitted that this case must be decided on some other ground than that given by the Circuit Court of Appeals if the Government is to prevail. If the State acquired title by the certifications of 1901 and 1904, and if the Statute of Limitations operated in favor of the State upon those certifications, then undoubtedly the State had a title of an indefeasible and invulnerable character on February 10, 1920, when by its patent it conveyed the legal title to these lands to the Carbon County Land Company. Of course, if the State had nothing to convey, then neither the Carbon County Land Company nor any other grantee could get anything whatsoever by reason of the State patent; but it is submitted that the Carbon County Land Company was as capable of acquiring whatever title the State had in a *transaction new and independent* from the contracts annulled in the suit of 1907 as any other party could have been.

The opinion of the Circuit Court of Appeals expressly states that the Government's right of recovery as against the Independent Coal & Coke Company depends upon whether it acquired an interest in the land without notice of the appellants' rights or without value. (R. 34.) This idea, so clearly expressed by the Court of Appeals, absolutely precludes the existence of the idea that the State had nothing to convey. If the State had nothing to convey, then neither a bona fide purchaser nor any other purchaser could ever acquire anything from the State; but that the State did have something to convey is established beyond controversy not only by the opinion of the Court of Appeals, but also by the very existence of this suit itself. If the title held by the State was barren, dry, impotent and non existent, then the State patent is absolutely void, and neither the Carbon County Land Company, the Independent Coal & Coke Company, nor any other person can become possessed of any part or portion of the title to this land through or by means of any act of the State of Utah. If once it is concluded, as the Circuit Court of Appeals did conclude, that the State had title against and upon which a constructive trust could be based, then, if the Statute of Limitations, to-wit: Section 8 of the Act of March 3, 1891, can apply to a certificate, that ends this case in favor of every party defendant to it, including not only Carbon County Land Company but Carbon County itself,—the latter claiming an interest in the land by reason of tax sales. This must be true; otherwise, the whole suit fails as a vain and useless proceeding.

CONTENTION NO. 3.
NO EQUITY IN BILL.

In the lower court we contended that there was no equity in the bill of the Government. It appears that the grantees of the State have relied upon the validity of the title conveyed to them; that they have taken obligations; have paid money, or the equivalent of money, for the land; that they have executed a mortgage to the State; that Carbon County has sold some of the lands for taxes; that the Government has divested itself of its title as early as 1904; that the State has divested itself of its title as early as 1920; that it has a purchase money mortgage for $556,428; that twenty years intervened between the last certification and the commencement of the present suit by the Government. On the face of the records, excepting therefrom the decree of 1914, the ownership of the land was private. It was made the subject of taxation. It was bought and sold. The tax rate of Carbon County was undoubtedly

fixed with reference to this land. Even in the face of these circumstances and of this long delay, the Government in its bill does not offer to do any equity whatsoever. The Government has seen fit to lie idly by for these many years, until the defendants, or some of them, have purchased the land, and then the Government, four years after the patent issued by the State, has brought this action as against the individual purchaser to have that purchaser declared a constructive trustee. By its prayer it has suggested that it will bring a suit against the State in this court to annul the mortgage. If it is necessary to bring such a suit, then that mortgage must have some force and validity. If either a conveyance by the State or a decree against the State and in favor of the Government was necessary in order to divest the State of its title then it must follow that the State had something that it could convey and something that a lapse of time would make perfect.

It is therefore respectfully submitted that whatever defects, if any, there existed in the State's title had been purged from that title by Section 8 of the Act of March 3, 1891, before the State conveyed said title on February 10, 1920. It ought to go without saying that the title of the State was not in any manner affected by the decree rendered in the suit of 1907. The principle that only parties or their privies are affected by decree is too well known to require the citation of authority. The decree rendered in the 1907 suit is obviously not binding on the State and its subsequent grantees.

Brandon v. Ard, 211, U. S. 11.

This Court has with emphasis said that a decree rendered in a suit brought against the grantor after he has parted with title is not binding on the grantee.

Postal Telegraph Co. v. Newport, 247 U. S. 466.

A decree can be res adjudicata only as to matters actually decided or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

This Court has definitely recognized that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a *newly acquired title*.

Barrows v. Kindred, 4 Wall. 399
Merryman v. Bourne, 9 Wall. 592
United States v. Southern Pacific R. R. Co., 223 U. S. 565.

Under these cases the Carbon County Land Company, although a party to this 1907 suit, was within its rights in acquiring a *new* title from the State in 1920.

For these reasons it is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed and that the decision of the United States District Court for the District of Utah should be affirmed.

Respectfully submitted,

WILLIAM D. RITER,
MAHLON E. WILSON,
ALBERT R. BARNES,

Attorneys for Petitioner Independent Coal and Coke Company supporting Writ of Certiorari.

APPENDIX.

SEISIN AS DISCUSSED BY MR. HOLDSWORTH.

"Seisin is still prima facie evidence of ownership. The best right to seisin is still the only form of ownership recognized by English law. 'The standing proof that English law regards, and has always regarded, possession as a substantive root of title, is the standing usage of English lawyers and landowners with very few exceptions there is only one way in which an apparent owner of English land who is minded to deal with it can show his right so to do; and that way is to show that he and those through whom he claims have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim'. The earliest statute of limitations did not confer ownership on the person seised. In so far as it applied to corporeal hereditaments it simply barred the action of the person who might otherwise have had a better right to seisin. Even our present statutes content themselves with barring and extinguishing the right of the person who would otherwise have a better right to get seisin. They do not confer a title upon the person seised. A system of *usucapio* which by lapse of time turns *possessio* into *dominium* would be unnecessary and indeed unintelligible. All the law need do when it wishes to secure the rights of those seised against those who have a better right to seisin is to bar the better right. If they are seised, and if the titles of those with a better right to seisin are barred, they have the best titles which the law can give; and the fact that this is the principle underlying these statutes of limitation—a truth long since understood by the few students who cared to study the history of the law—has recently been stated by the Court of Appeal."

He cites:

Dalton v. Fitzgerald (1897) 2 Ch. 86

3 Holdsworth History of English Law 93-94.

on 95 he says:

"The law protects seisin because the person seised is owner till some one else proves a better right

to seisin; and therefore to ask why the law protects seisin amounts to asking why the law protects ownership."

(Is it not sound to say that all title rests on possession complemented by a lapse of time?)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 300.

INDEPENDENT COAL & COKE COMPANY AND CARBON COUNTY LAND COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER, CARBON COUNTY LAND COMPANY.

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Attorney for Carbon County Land Company.
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Of Counsel.

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INDEX.

AUTHORITIES CITED.

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BRIEF FOR PETITIONER, CARBON COUNTY LAND COMPANY.

It is the purpose of this brief merely to supplement the able brief filed herein by counsel for the Independent Coal & Coke Company, and the applicable contentions of that brief are adopted by this petitioner.

The opinion of the Circuit Court of Appeals is reported in 9 F. (2d) 517, and is also found at R. 31-35. The opinion of the District Court appears at R. 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 21, 1925 (R. 35). The cause is here on writ of certiorari granted March 22, 1926, under authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

By a bill exhibited May 16, 1924, in the United States District Court for the District of Utah, the United States sought a decree declaring the Carbon County Land Company and the Independent Coal & Coke Company to be trustees for the United States as to certain coal lands in Carbon County, Utah, which had been patented to the Carbon County Land Company by the State of Utah on February 10, 1920. The Independent Coal & Coke Company is a transferee of the Carbon County Land Company as to a part of these lands.

Carbon County, Utah, was made a party defendant because of a claim to a portion of the land under a tax sale in 1921 but its claim is not before this court on this record.

The bill alleged in substance the following (R. 1-5):

That during 1901-1904 upon application of the proper officials of the State of Utah, the Secretary of the Interior certified to the State, under grants made to it by the Act of July 16, 1894, c. 138, 28 Stat. 107, the Utah Enabling Act, the lands involved in the instant case.

That the State of Utah executed contracts of sale of these lands to certain named individuals and on January 7, 1907, the United States instituted suit in the United States District Court for Utah against those individuals and the Carbon County Land Company, to which the contracts of sale had been assigned, for the cancellation of those contracts upon the ground that the lands covered thereby were mineral lands, and were known to be such at the time of their selection by the State. After trial that suit resulted in a decree by that court which declared that the United States "is the owner and entitled to the possession" of the lands and that "plaintiff's title thereto be quieted against any and all claims of the defendants or either of them; that said defendants, and each of them have no right, title or interest, or right of possession in or to said premises * * * or to any part thereof; and that the said defendants * * * are perpetually restrained and enjoined from setting up or making any claim to or upon said premises * * * and all claims of said defendants * * * are hereby quieted." (R. 23.) This decree was affirmed. 228 Fed. 451.

That the State of Utah was not made a party to that suit because "it was believed by the plaintiff that the State would leave to the determination of the Courts, the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination."

That the State, however, did not so conform its subsequent action, but on February 10, 1920, issued its patent to said lands to the Carbon County Land Company, the same party to which the contracts of sale had been assigned, relying upon the fact that it had

not parted with the legal title to the lands at the time the decree was entered in the suit referred to. (R. 4.)

That the lands have already been determined to be mineral lands and as such not subject to selection by the State, and that this question is *res judicata*. (R. 5.)

The bill does not charge that there is any connection between the contracts declared to be invalid in the previous suit and the patent from the State to the Carbon County Land Company involved in this suit, but merely alleges that both the contracts and the patent covered the same lands and that the patent was issued to the same party to which the invalid contracts had been assigned.

Separate motions to dismiss the bill were filed by the respective parties (R. 19, Independent Coal & Coke Company; R. 20, Carbon County Land Company). The grounds for each motion were identical, (1) that the bill did not disclose facts sufficient to constitute a cause of action, (2) that the cause of action was barred by the statute of limitations in that suit was not brought within six years from the accrual of the cause of action. Sec. 8, Act of March 3, 1891, c. 561, 26 Stat. 1099; Comp. Stat. Ann. 1916, Sec. 5114.

The motions were sustained (R. 23), and a decree entered dismissing the bill (R. 24).

In its opinion (R. 24) the District Court held:

> "The certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the Act of March 3, 1891.
>
> "The motion of defendants to dismiss will be sustained on the ground that the cause of action alleged in the complaint is barred under the provisions of said section. * * *"

Upon appeal, this decree was reversed except as to Carbon County by the Circuit Court of Appeals and the cause remanded with instructions to permit the defendants to answer. (R. 35.)

SUMMARY OF THE ARGUMENT.

I. The *legal* title to the lands passed to the State of Utah by the certifications made in 1901-1904, and was unaffected by the decree in the first suit.

II. By virtue of the statute of limitations, the legal title of the State had ripened into an impregnable title by the time the State, on February 10, 1920, patented the lands to the Carbon County Land Company.

III. The Carbon County Land Company was not, by virtue of the decree in the first suit, debarred from receiving patent to these lands from the State, in 1920, nor from availing itself of the impregnable title thereby obtained, since the transactions through which it obtained title were not a continuation of, but entirely distinct from, the transactions which were the subject of litigation in the first suit.

IV. The decree in the first suit is not *res judicata* in the present suit.

ARGUMENT.

I.

The Legal Title to the Lands Passed to the State of Utah by the Certifications Made in 1901-1904, and was Unaffected by the Decree in the First Suit.

There can be no question that the *legal* title to the lands involved passed to the State of Utah by virtue

of the several certifications made to it by the Secretary of the Interior in 1901-1904. The certifications were equivalent to patents. Frasher v. O'Connor, 115 U. S. 102, 116; Williams v. U. S., 138 U. S. 514, 516; Curtner v. U. S., 149 U. S. 662, 675; Deweese v. Reinhard, 165 U. S. 386, 390.

That this *legal* title of the State was not drawn in question in the first suit nor affected by the decree therein appears to be conceded by the allegations of the bill in the instant case. In paragraph 5, (R. 4) it is set forth that the State was not made a party to the first suit because the United States believed it would conform its subsequent action to the determination made in that suit by the courts. This statement can mean nothing else than that the United States expected the State to reconvey to it the *legal* title upon the successful conclusion of the above mentioned suit.

The legal title being in the State it could not, of course, be divested in a suit to which the State was not a party. The United States merely claims that it has the equitable title as it alleges "that at all times the title to said lands has been equitably in the United States." (Bill, par. 10, R. 5.) In other words, it is in effect admitted that the legal title was not affected by the previous suit and is still outstanding.

II.

By Virtue of the Statute of Limitations the Legal Title of the State Had Ripened Into an Impregnable Title by the Time the State on February 10, 1920, Patented the Lands to the Carbon County Land Company.

The certifications of these lands to the State of Utah were made during the years 1901-1904.

Section 8 of the Act of March 3, 1891, *supra*, provides:

> "Suits by the United States * * * to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The effect of the statute was to make good the title conveyed by the United States. U. S. v. Chandler-Dunbar Water Power Company, 209 U. S. 447; U. S. v. Whited & Wheless, 246 U. S. 552, 563.

Obviously the decree in the first suit against the Carbon County Land Company did not affect the title of the State as the State was not a party to that suit. That decree, it is true, as to the parties to the suit, adjudicated the lands to be mineral in character but that did not deprive the State of such title as it then had and that title was such as would, and did, ripen into a good title by operation of the statute of limitations, regardless of the character of the lands or the means by which the State procured title. Stockley v. U. S., 260 U. S., 532, 542, 543. At any time within six years from the dates of the certifications to the State the United States could have brought suit to annul the certifications and to regain title. Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 692, 693. Not having seen fit to do this, the certifications, after the lapse of the statutory period, became conclusive. That is the very object of the statute. Cramer v. U. S., 261 U. S. 219, 233, 234; U. S. v. Winona & St. Peter R. Co., 165 U. S. 463.

In the Winona case, speaking of this statute of limitations, the court said (p. 476):

> "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was * * * open to sale, and conveyance through the land department."

The purpose of this statute of limitations was said by this court in U. S. v. Whited & Wheless, *supra*., to be to "promote prompt action for annuling patents where cause therefor was believed to exist, and to make titles resting upon patents dependably secure when the period of limitation should expire." It was "that patent titles might be made secure" (pp. 562, 563).

And in Cramer v. U. S., *supra*, the court said that the object of the statute was "to extinguish any right the *Government* may have in the land * * *."

It is true, the statute does not expressly refer to suits to annul titles other than titles conveyed by patent, but titles conveyed by certification are clearly within the intent and purpose of the Act. U. S. v. Whited & Wheless, *supra*. Under the well established practice of the Land Department, lands selected by a State are conveyed to the State, not by patent but by certification, and as shown above such certification is equivalent to a patent. As this court said in Shaw v. Kellogg, 170 U. S. 312, 351,

> "* * * the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent' or in the instrument which the word defines. By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued."

It was contended in that case that the ruling in Barden v. Northern Pacific Ry. Co., 154 U. S. 288, was not applicable because in the Barden case a patent was involved, but no patent had been issued in the Shaw case. The court expressly rejected the contention.

In U. S. v. Winona & St. Peter R. Co., *supra.*, the United States sued to recover lands which had been certified to the State of Minnesota for the benefit of the railroad company. In considering the equities of the company by reason of the long lapse of time since certification, this court referred to the statute of limitations here involved and while holding it not applicable because suit had been brought within the time prescribed, it did say respecting it and another statute (p. 476) "we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent."

So far as the applicability of the statute is concerned, manifestly there is no logical ground for distinguishing between certification and patent. As the purpose of the statute was to make good and to make dependably secure titles conveyed by the United States, it is entirely immaterial how such titles are evidenced. As was observed in Shaw v. Kellogg, *supra.*, "there is no magic in the word 'patent' " and when by whatsoever instrument the title passes, the same result follows as through a formal patent were issued.

The Circuit Court of Appeals held that the statute of limitations is not applicable because the instant suit is not an attack on the certifications, but is an acceptance of them. We find no basis for this view. When the United States discovered that known coal lands had been certified to the State of Utah as a result of fraud practiced, it was entitled to disaffirm the trans-

action and recover the lands, or it might have elected to affirm the transaction and recover damages for the fraud; but it could not do both. These remedies are inconsistent; that to recover the lands is founded upon a disaffirmance, and that to recover damages is founded upon an affirmance of a voidable transaction. U. S. v. Oregon Lbr. Co., 260 U. S. 290, 294, 295.

The basis of the first suit was the fraud which had been perpetrated upon the United States whereby the title to the land had been secured from it. The relief sought was the cancellation of the *contracts* which the State had entered into for the sale of the lands.

In this present suit, what is sought is the divesting of the Carbon County Land Company of the title which it now has under the *patent* from the State of Utah.

The Court of Appeals apparently was misled into considering the present suit as proceeding upon the theory of acceptance of the certifications by the fact that the relief prayed for was "that the defendant be adjudged and decreed to hold whatever title they have to the said lands in trust for the plaintiff." (R. 5)

The basis for suits such as this is that the *equitable* title has, because of the fraud, never left the party defrauded; that he is entitled to recover the *legal* title, which was unlawfully obtained and being successful in the suit, this *legal* title is reunited with the *equitable* title in him. Northern Pac. Ry. Co. v. McComas, 250 U. S., 387, 390; Cf. Byron v. U. S., 259 Fed. 371; Bradford v. U. S., 222 Fed. 258.

When the United States brought the first suit in avoidance it did not recognize the Carbon County Land Company as having the equitable title to the lands. It could not have admitted equitable title in the

company without putting itself out of court for the whole case proceeded upon the theory that the equitable title had never left the United States. The equitable title could not be in both the United States and the company. The United States in that suit was really quieting its equitable title against the clouds cast on it by the voidable *contracts* then under consideration.

This was also the theory of the Williams case upon which the first suit involving these lands was patterned. This court in that case stated the scope of the allegations of the bill to be "that the lands were improperly certified to the State; that in equity it had no title, and its contract with appellant transferred nothing to him; and the prayer was for the cancellation of the contract * * * and an adjudication that the appellant had no title or interest in such lands." 138 U. S. at 515.

In the present suit, the government's case proceeds upon the same theory—that equitable title still remains in the United States—and the relief sought is the setting aside of the legal title which in 1920 vested in the Carbon County Land Company under the State's patent, and the reuniting of that legal title with the equitable title which at all times remained in the United States. The difficulty that now confronts the Government is that its equitable title has been extinguished by the operation of the statute of limitations, and the fraud which formed the basis of the first suit has, so to speak, been blotted out. As the bill in this suit does not charge that the fraud relied upon in the first suit had any connection with the transaction in 1920, whereby the Carbon County Land Company obtained a patent from the State, it follows that there is no fraud upon which a trust can now be predicated.

It is to "stick in the bark" to say that in seeking in this suit to acquire such title as passed to the Carbon County Land Company, the United States acquiesces in or accepts the certification of the Secretary and confirms the title thereunder, because that assertion is diametrically opposed to the avowed purpose of the present suit, as appears from the allegation of the bill "that at all times the title to said lands has been equitably in the United States." (Par. 10, R 5). The prayer of the bill calls for the complete annihilation of the title deraigned from the certifications, and a decree granting the relief prayed for would not leave a vestige or trace of title in the Carbon County Land Company or its grantee.

If the statute does not give repose to titles as against suits such as this, then the entire effect of the statute is merely to require a slightly different form of action, after the statute has run, in order to accomplish the same purpose as would be accomplished by a suit to annul a patent brought within the statutory period.

In the brief of the learned Solicitor General in opposition to the petition for certiorari herein, the argument was made that inasmuch as the statute of limitations had run by the time the decree was rendered in the first suit the Carbon County Land Company could have pleaded that fact and that the decree quieted title as against any claim of title by virtue of the statute. The Carbon County Land Company, however, could not have pleaded the statute, first, because it did not have or claim to have the legal title, and secondly, the statute had not run at the time that suit was commenced.

During all the time of the pendency of the first suit the State of Utah held the *legal* title. The Carbon County Land Company did not obtain the *legal* title until February, 1920.

As the effect of the statute of limitations when it becomes operative, is to confer the *equitable* title upon the holder of the *legal* title it is obvious that the Carbon County Land Company could not have availed itself of the statute in the first suit, and could not have raised any issue based on the statute by any allegation it was then in a position to make.

III.

The Carbon County Land Company was not, by Virtue of the Decree in the First Suit, Debarred from Receiving Patent to These Lands from the State, in 1920, nor from Availing Itself of the Impregnable Title Thereby Obtained, Since the Transactions Through Which It Obtained Title, Were not a Continuation of, but Entirely Distinct from, the Transactions Which Were the Subject of Litigation in the First Suit.

The ultimate proposition sought to be established in what immediately follows is that the patent issued by the State of Utah to the Carbon County Land Company on February 10, 1920, conveyed good title.

The test of this proposition is whether the State, on February 10, 1920, had good title to convey, and if it did, then were there any facts present which had the effect of transforming the perfect title of the State into a bad title or a title in trust in its grantee.

That the State had good title to convey is a proposition about which there can be no doubt. The legal title had reposed in the State for over sixteen years during which time the United States had made no effort to annul or set aside that title. The present suit, indeed, is the only attempt ever made by the Gov-

ernment to annul or to regain the legal title. Let us suppose that the United States had brought suit against the State in 1920 prior to the conveyance of the lands by the State to the Carbon County Land Company. What would have been the result? The court would have been bound to hold that the statute had run, that the Government's title had been entirely extinguished, and that the State had a complete and unimpeachable title by virtue of the statute of limitations "under the benign influence" of which the certifications became "conclusive as a transfer of the title." The corollary of this proposition is that in the absence of fraud against the United States in procuring the patent that was issued to it by the State on February 10, 1920, the Carbon County Land Company acquired title of the same quality as the State then had. The United States does not claim that there was fraud in that transaction, but merely asserts in its bill that in 1901-1904 the assignors of the Carbon County Land Company, in a separate and distinct transaction, had committed fraud in procuring the certification of the lands to the State. It seems to be the theory of the bill that once a party is adjudged to be guilty of fraud in securing title to land he is forever barred from obtaining title thereto. Of course, the entire aspect of the case would be different if the bill in this case had alleged that the fraud involved in the transactions in 1901-1904 was the basis or became a constituent element of the transaction in 1920. We are not asserting that the Government might not have proceeded as it did if the Carbon County Land Company, after the decree in 1914, had persisted in its then existing contracts with the State for the purchase of the lands and had obtained the patent in fulfill-

ment of those contracts. But, as stated, the bill in this case does not allege that the transaction here involved, that is, the sale in February, 1920, is the same or was in pursuance of the same transactions passed upon by the decree in the first suit. Not even by inference can it be said that the bill contains such allegation. In paragraph 6 (R-4) the bill alleges that the State of Utah has not seen fit to conform its action to the determination made in the first suit but "on the contrary * * * the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned * * *".

Those contracts were cancelled by the decree in that suit and there is no allegation that either the State or the Carbon County Land Company thereafter attached any importance to them or recognized them in any way. As appears from the opinion of the Circuit Court of Appeals in the first case, which is made an exhibit to the bill in the present suit, these contracts called for the payment of $1.50 per acre on ten years time (R-12) upon the basis that the lands were non-mineral. The transaction in 1920, on the contrary, involved the purchase of the lands at $100 per acre. Thus, it is seen that in addition to the fact that there is no allegation that the two transactions were related, it affirmatively appears that they were separate and distinct. Since that is the case it cannot be said that the Carbon County Land Company has flouted the decree in the first suit. On the contrary it has suffered all of the consequences incident to that decree and has proceeded in strict observance of it.

IV.

The Decree in the First Suit is not Res Judicata in the Present Suit.

The first suit was brought to cancel the *contracts* which the defendants therein had with the State of Utah and to remove the clouds cast thereby upon the Government's equitable title to the lands. It was predicated, as we have seen, upon the fraud whereby the *legal* title had been secured from the United States.

The present suit seeks the divesting of the *legal* title and involves the transaction between the State and the Carbon County Land Company which resulted in the issuance of the patent to the latter, in February, 1920. No fraud is charged as to this transaction.

This later transaction is, as has been shown, entirely distinct from the contracts which were the subject of the first suit. As a different transaction, and a different title is involved in this suit than that which was involved in the first suit, the claim or demand is not the same. The judgment in the first suit is not, therefore, *res judicata* as the subject-matter of that suit is entirely different from that in this suit. Whenever the claim asserted in the first suit is different from that asserted in the later suit the decree in the first case is *res judicata* only as to matters which the decree actually decides, but not as to matters which might have been but were not pleaded. Cromwell v. Sac County, 94 U. S. 351; Virginia Carolina Chemical Co. v. Kirven, 215 U. S. 252; Troxell v. D. L. & W. R. R. Co., 227 U. S. 434; Bates v. Boslie, 245 U. S. 520; United Shoe Machinery Corp. v. U. S., 258 U. S. 451.

The rule that a defendant in a petitory action must plead all the titles under which he claims to be owner,

and that a final judgment rendered in favor of the plaintiff may be pleaded as *res judicata* against any title which the defendant was possessed of at the time, (Black on Judgments, 2nd Ed. Vol. 2, Sec. 755) can have no application here, for the Carbon County Land Company did not have legal title when the first suit was litigated.

Having later obtained the legal title, it is entitled to assert it and to rely upon it in defense of this later suit, unembarrassed by the judgment in the first suit.

A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered. Ash Sheep Co. v. U. S., 252 U. S. 159, 170.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court, dismissing the bill, should be affirmed.

Respectfully submitted,

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Of Counsel.

Frank K. Nebeker.
Attorney for
Carbon County
Land Company

INDEX

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 984

INDEPENDENT COAL & COKE COMPANY AND CARBON COUNTY LAND COMPANY, petitioners

v.

UNITED STATES OF AMERICA AND CARBON COUNTY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals is not reported. It appears at R. 31–35.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 21, 1925. (R. 35.) The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

STATEMENT

By its bill filed May 16, 1924, in the United States District Court for the District of Utah, the United States sought a decree holding the Carbon County Land Company and the Independent Coal & Coke Company trustees for the United States in respect to certain coal lands in Carbon County, Utah, which had been patented to the Carbon County Land Company by the State of Utah on February 10, 1920. The Independent Coal & Coke Company claims an interest in a portion of the land through the Carbon County Land Company.

Carbon County, Utah, was made a party defendant because of a claim to a part of the land under a tax sale in 1921.

By the bill the following situation was disclosed (R. 1–5):

During 1901–1904 upon application of the proper officials of the State of Utah the Secretary of the Interior *certified* to the State, under grants made to it by the Act of July 16, 1894, c. 138, 28 Stat. 107 (the Utah Enabling Act), the lands involved in the instant case. In 1907 the United States brought suit in the United States District Court of Utah against the Carbon County Land Company and others for a decree setting aside certain contracts of sale from the State of Utah to some of the defendants covering these lands. These contracts had been assigned to the Carbon County Land Company. The theory of the bill, which was brought under authority of

Williams v. *United States*, 138 U. S. 514, was that the lands were coal in character, known to be such at the time the State's right would otherwise have attached, and hence not eligible to pass to the State, and by fraudulent representations of the defendants or some of them the Secretary of the Interior was induced to certify the lands to the State.

The United States succeeded in that suit, and a decree was entered June 8, 1914, declaring it the owner of the lands and quieting its title to them as against the claims of the defendants. (R. 2–4.) This decree was affirmed November 15, 1915, by the Circuit Court of Appeals (R. 4), Opinion 228 Fed. 431, 439. (R. 6–18.) (Appeal dismissed, 248 U. S. 594.) This decree, dated June 8, 1914, was in the present tense and adjudged "That the plaintiff *is* the owner and entitled to the possession of the following described property," etc., and that "said defendants, and each of them *have* no right, title or interest" and that "the plaintiff be and is hereby adjudged to be the true and lawful owner." (Italics ours.)

The decree did not purport to settle the title as of the date of the commencement of the suit, but as of the date of the decree, June 8, 1914, and it was not limited by its terms to quieting the plaintiff's title merely as against the contracts issued by the State in 1901.

Notwithstanding this decree the State of Utah did not conform its subsequent action thereto but thereafter patented the land to this same Carbon

County Land Company on February 10, 1920. (R. 4.) Upon being apprised of this action, and after unsuccessful negotiations with the State of Utah, the Government brought the instant suit, pleading the former judgment as making the matter *res adjudicata*. (R. 5.)

Each of the defendants filed a motion to dismiss resting mainly upon the proposition that the suit was barred under Section 8 of the Act of March 3, 1891, c. 559, 26 Stat. 1093, because more than six years had elapsed since the cause of action arose (apparently having reference to the date of the certification to the State of Utah of the lands by the Secretary of the Interior). (R. 19, 20, 22.) The motions were sustained (R. 23), the District Court holding (R. 24)—

> The certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the Act of March 3, 1891.

A decree dismissing the bill was entered January 21, 1925. (R. 24.) The Circuit Court of Appeals reversed that decree except as to Carbon County, and remanded the case with instructions to permit the other defendants to answer. (R. 35.)

SUMMARY OF ARGUMENT

I. THE FORMER ADJUDICATION CONCLUDES THE PETITIONERS. AS BETWEEN THEM OR THEIR ASSIGNORS AND THE UNITED STATES THE DECREE IN 1914, USING

WORDS IN THE PRESENT TENSE, DETERMINED IN EFFECT THAT THE STATE, WHOSE CONTRACTS OF SALE THEY HELD, THEN HAD NO TITLE. THE CONVEYANCE THEY LATER OBTAINED FROM THE STATE CONVEYED NO DIFFERENT RIGHT OR NEW INTEREST. SUCH TITLE, IF ANY, AS THE STATE EVER ACQUIRED BY VIRTUE OF THE STATUTE OF LIMITATIONS WAS ACQUIRED BEFORE THE DECREE OF 1914 WAS ENTERED AND WAS CONCLUDED AS TO THE PETITIONERS BY THE FORMER ADJUDICATION.

II. THE CASE IS NOT ONE WHICH THIS COURT SHOULD REVIEW.

ARGUMENT

I

THE MATTER INVOLVED IS RES ADJUDICATA

In the former suit the title claimed by the defendants was derived from the State under contracts of sale from the State made in 1901. In the present suit the same defendants or their assignees claim a title derived from the State by patent issued in 1920.

The former adjudication of June 8, 1914, determined as between the United States and the assignees of the State, that the *State* had obtained no title by the certification and that the United States was the owner of the land. In the present suit the petitioners seek to avoid the claim of *res adjudicata* by asserting that *after* the 1907 suit the State ultimately acquired good title by lapse of time, and the expiration of six years from the date of the certification, giving the State title under the

statute of limitations, which the petitioners or their assignors purchased from the State after the former decree. The statute of limitations relied on is the Act of March 3, 1891, Section 8, c. 559, 26 Stat. 1093, it being claimed that a suit to cancel a certification is the same as a suit to cancel a patent, and therefore within the statute.

In other words it is contended that the decree in the 1907 suit is not *res adjudicata* as to the later acquired title of the State. (Petition for Certiorari, p. 8.) This sounds fair and if the State had acquired a title from the United States *after* the decree in the former suit, we would have difficulty in claiming that these defendants on purchasing such title would be barred from asserting it by the former adjudication.

The Record however will not supply the facts to support this claim.

The certifications were made in 1901 and 1903. (R. 8–11.)

If the statute of limitations on suits to cancel patents applies, and *runs from the date of certification*, as claimed by the petitioners, the State's title ripened in 1907 and 1909.

The former suit was commenced in 1907, but the decree was not entered until 1914, after the State's title ripened (if it did ripen) under the statute of limitations. The decree determines the title as of 1914, and by its express terms states that the title *is* in the plaintiff, and the defendants *have* none.

As between the parties it adjudged that the State *then* had no title. The State obtained nothing more after the decree of 1914. When its deeds were made to petitioners in 1920, it had no other or different title, so far as the statute of limitations goes, than it had when the decree was entered.

Consequently the claim of the petitioners that in 1920 they purchased a title from the State "newly acquired" since the decree is unsupported by the Record.

If the State had no title when it made the contracts of sale in 1901–3, but acquired a title by virtue of a statute of limitations in 1907–9, that subsequently acquired title, under well-settled rules, inured to the benefit of its vendees. Consequently if the statute of limitations point is good, the defendants in the former suit, having no valid interest in the lands when the former suit was brought, acquired it pending the suit and before the decree. They might have succeeded if they had brought this situation to the attention of the court in the former suit, or if they had seen to it that the decree was so worded as to adjudicate the title as of 1907 instead of at the date of trial or decree. They did neither. The decree was that they had no valid interest in 1914, and it thus, in effect, as to them, determined that the State had no title then. The State acquired nothing since 1914, and the plea of *res adjudicata* is good. This is a proper case for the application in all its rigor of the rule that a matter once adjudicated cannot be reopened. The

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 300

INDEPENDENT COAL & COKE COMPANY AND CARBON COUNTY LAND COMPANY, Petitioners,

v.

UNITED STATES OF AMERICA AND CARBON COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 31) is reported in 9 F. (2d) 517. It reversed the decree of the District Court for the District of Utah dismissing the complaint (R. 24), not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 21, 1925. (R. 35.) Certiorari was allowed by this Court March 22, 1926, under Section 240(a) of the Judicial Code, as amended by

the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

STATEMENT

This case arose in the United States District Court for the District of Utah, in which, on May 16, 1924, the United States filed its bill (R. 1) seeking a decree that the Carbon County Land Company and the Independent Coal and Coke Company are trustees for the United States in respect of certain coal lands in Carbon County, Utah, which had been patented to the Carbon County Land Company by the State of Utah on February 10, 1920. The Independent Coal & Coke Company claims an interest in a portion of the land through the Carbon County Land Company.

The case was disposed of in the District Court on motions of the defendants to dismiss the bill of complaint, which were granted (R. 19-24), and the facts open to consideration are those to be derived from allegations in the bill of complaint and disclosed in the exhibits to the bill.

By Sections 8 and 12 of the Act of Congress approved July 16, 1894, c. 138, 28 Stat. 107, 109, 110, there were granted to the State of Utah many thousands of acres of land for the purpose of erecting an agricultural college, a school of mines, and a deaf and dumb asylum. There was no grant in place, and all lands were to be selected by the State from unappropriated public lands in such manner as the legislature should provide, with the approval of the Secretary of the Interior. The legislature of the

State created a board of land commissioners to deal with the subject, with power to select the lands and procure a transfer from the United States.

The lands involved in this case were, during 1901–1904, certified to the State of Utah under this Act. (*R.* 1.)

Between December 10, 1900, and September 14, 1903, Stanley B. Milner, Truth A. Milner, his wife, Harley O. Milner, acting through Stanley B. Milner as agent, and Samuel H. Gilson, the predecessors in interest of the Carbon County Land Company, made application to the board of land commissioners of the State to purchase the lands here involved, and requested that the State select the lands and procure a patent to the State to be issued by the authorized officers of the United States, and that upon such selection and patent the applicants would purchase the land at a price of $1.50 per acre, payable in installments in ten years. (R. 7–8.) The grant from the United States did not contemplate the selection of mineral lands.

The Milners, at the time of their application, submitted affidavits (R. 8–9) that they had knowledge of the character of the lands and that they were non-mineral and did not contain any deposit of coal, and the president and secretary of the State board of land commissioners signed and submitted to the Land Office of the United States affidavits (R. 9–10) that—

> we have caused the lands mentioned to be carefully examined by agents and employees

> of the state as to their mineral or agricultural character,

and stating that there were not within the limits of the land any deposits of coal. The lands were certified on the faith of these representations.

The agreements by the Milners to purchase the land from the State were assigned to the Carbon County Land Company, having a total capital of 100,000 shares, of which Stanley B. Milner owned 99,950. (R. 18.)

In January, 1907 (R. 2, 32), the United States brought suit in the United States District Court for the District of Utah against the individual purchasers from the State and the Carbon County Land Company. While the bill of complaint in this case states (R. 2) that this suit was "for the cancellation of said contracts of sale upon the ground that the said lands were mineral lands, and were known to be such at the time of their selection by the State," the record in the first suit shows that it was an action to quiet title of the United States (R. 6), and the decree which was entered was not a decree cancelling the contracts to purchase between the Milners and the State, but a decree adjudging that the United States was the owner and entitled to possession and quieting its title against any and all claims of the defendants and enjoining the defendants perpetually from setting up or making any claim to the lands (R. 2-4). The theory of the bill in the original suit was that the lands were coal in character, known to be such at the time of selection

and certification, and not properly certified on that account, and that the certification had been procured by fraudulent representations of the defendants. The State of Utah was not made a party.

The United States succeeded in that suit, and on June 8, 1914, a decree was entered (R. 2) adjudging, in the present tense, that the United States "is the owner and entitled to the possession" of the lands in question; that its title be quieted against the claims of the defendants or any person claiming under them, and that the defendants "have no right, title or interest, or right of possession." This decree was affirmed November 15, 1915, by the Circuit Court of Appeals. *Milner* v. *United States*, 228 Fed. 431. Appeal dismissed, 248 U. S. 594.

The decree in the former case and the opinion of the Circuit Court of Appeals were set forth in or attached as exhibits to the bill of complaint in this case (R. 2, 6). The decree did not purport to settle the title as of the date of the commencement of the suit, but as of the date of the decree, and it was not limited by its terms to quieting the plaintiff's title merely as against the contracts issued by the State. The certifications made by the Secretary of the Interior on selections by the officers of the State land board were made at different dates from June 22, 1901, to December 1, 1904. Only one certification, that relating to the Gilson purchase, was made as late as December 1, 1904. The one last preceding it was made May 8, 1904 (R. 12), more than ten

years before the date of the decree in the former suit, which was June 8, 1914. At the time the decree was entered in the former suit, no patents from the State of Utah to the purchasers had been issued, but "payments as required by the contracts of purchase" had been made as therein provided. (R. 12.)

Notwithstanding the decree in the former suit, the State of Utah did not conform its subsequent action thereto by selecting other lands, but, quoting the language of the bill (R. 4):

> On the contrary, on February 10, 1920, the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the before-mentioned suit.

If the statute of limitations against suits to cancel patents applies to certifications under the statute here involved, then the statute would have run in favor of the State between the date of the institution of the original suit in 1907 against the Carbon County Land Company and the date of the decree therein in 1914.

There is nothing in the record herein to indicate that the patent from the State to the Carbon County Land Company in February, 1920, was or was not pursuant to the original contracts to purchase.

In the brief filed by the State of Utah *amicus curiae* in support of the petition for certiorari, it is disclosed that the State is quite willing to reap the benefit of the fraud perpetrated and adjudged against the Carbon County Land Company, because it is therein stated, although it is not part of the record, that the conveyance of 1920 from the State to the Carbon County Land Company was pursuant to a new contract by which the land company agreed to buy the land for a substantial sum, the first installment to be paid in 1930, and the next in 1940, and the last in 1950.

Each of the defendants filed a motion to dismiss, resting mainly on the proposition that the State was barred under Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, because more than six years had elapsed since the cause of action arose (apparently having reference to the dates of the certifications to the State of Utah, R. 19, 20, 22). The District Court sustained the motions, holding that "certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the act of March 3, 1891." (R. 24.) The Circuit Court of Appeals reversed that decree, except as to Carbon County, which had a small claim for taxes, and remanded the case with instructions to permit the other defendants to answer. (R. 35.)

SUMMARY OF ARGUMENT

The statute of limitations is not a bar to the relief now sought. The action is not to set aside or cancel a certification, but is in aid of a former decree which declared the equitable title of the petitioner Carbon County Land Company fraudulent and void and vested title in the United States. The effect of the former decree was to make the petitioner incompetent to hold against the United States any title based upon the original fraud, and when the State conveyed the legal title to the Carbon County Land Company that company and its assignee held it impressed with the trust in favor of the United States. To have that trust declared by decree is the purpose of the suit.

The statute of limitations applicable to patents does not apply to certifications.

ARGUMENT

I

THE STATUTE OF LIMITATIONS IS NOT A BAR TO ANY RELIEF SOUGHT IN THIS CASE

The object of this action is not to set aside a patent or a certification of public lands, but by invoking fundamental principles of equity to secure the practical benefit of a decree which the United States obtained 12 years ago against the Carbon County Land Company, then adjudged guilty of being a party to a fraudulent scheme to divest the title of the United States to a valuable portion of

the public domain, and now one of the petitioners herein. The fraud was in making false statements and procuring false affidavits and inducing the State of Utah to use them to obtain from the Interior Department coal lands which that Department had no authority to certify, upon the representation that they were agricultural lands which the Department did have authority to certify. The case was similar to *Charleston, South Carolina, Mining & Mfg. Co.* v. *United States* (February 21, 1927).

The good faith of the State was not then questioned. Its selection of the lands was made for the purpose of selling them to the conspirators who had previously made application to the State to purchase them. (R. 12, 13; *Milner* v. *The United States*, 228 Fed. 431, 435, 436.) "The plan made use of the State as a mere conduit through which the lands were to be fraudulently acquired." (R. 33.) The agreements to purchase were assigned to the Carbon County Land Company, of the stock of which Milner, one of the conspirators, owned 99,950, out of a total of 100,000 shares. (R. 18.) The Circuit Court of Appeals said (R. 18):

> We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States.

The scheme succeeded so far that the lands were certified and payments to the State, as required by the contract of purchase, had been made. (R. 12.)

The United States brought its suit against the conspirators and their assignee, the petitioner *Carbon County Land Company*, and on June 8, 1914, obtained a decree which—

(1) Adjudged that the United States was the owner and entitled to the possession of the land;

(2) Quieted its title against any and all claims of the defendants or of those claiming through or under them;

(3) Adjudged that the defendants had no right, title, interest, or right of possession in or to the lands;

(4) Perpetually enjoined the defendants from setting up or making any claims to or upon the lands and quieted all their claims.

Notwithstanding this decree we now find that company claiming ownership of these same lands under a patent from the State of Utah dated February 10, 1920, issued, as alleged in the bill and admitted by the motion to dismiss, in reliance upon the fact that that State "had not parted with the legal title to the lands" at the time the decree was entered. (R. 4.) The bill avers "that at all times the title to said lands has been equitably in the United States," and asks that the defendants be adjudged and decreed "to hold whatever title they have to the said lands in trust for the plaintiff (United States), and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession," subject to the mortgage taken by the State to secure the

payment of the purchase price. (R. 5.) It is *res adjudicata* against the petitioners that on June 8, 1914, the United States was the true owner and entitled to the possession of these lands, and that petitioners' inchoate or equitable title under its contract of purchase from the State of Utah was void for fraud in procuring a record title in the State, its vendor. That record title having now been conveyed by the State to the same parties, equity and good conscience require that it, too, should be surrendered so that complete beneficial enjoyment of the fruits of that decree may vest in the United States.

To enforce that right the present suit was begun. The Circuit Court of Appeals held very properly that the suit was in aid of the former decree and to obtain the benefits of that decree; that as to the Carbon County Land Company the bill was a supplemental bill, or, more properly, an original bill in the nature of a supplemental bill and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required. *Root* v. *Woolworth*, 150 U. S. 401; *Shields* v. *Thomas*, 18 How. 253, 262; *Thompson* v. *Maxwell*, 95 U. S. 391, 399; *Story's Equity Pleadings*, 10th ed., Secs. 338, 339, 345, 351(b), 355, 429, 432. *Cooper* on *Equity Pleading*, pp. 74, 75.

As to the merits, the court held that if the case stated in the bill should be made out it would seem clear that the relief sought should be granted as to the Carbon County Land Company and the Inde-

pendent Coal & Coke Company. *Meader* v. *Norton*, 11 Wall. 442, 458; *Moore* v. *Crawford*, 130 U. S. 122; *Jones* v. *Van Doren*, 130 U. S. 684, 691; *Monroe Cattle Company* v. *Becker*, 147 U. S. 47, 57.

The case does not, therefore, seek to set aside a patent after the running of the statute of limitations, but to make perfect rights secured by judgment in an action brought before the statute had run.

Although the bill of complaint in this case says that the original suit was brought to cancel the contracts of purchase between the predecessors of the Carbon County Land Company and the State, the record elsewhere disclosed conclusively, we think, that such was not and could not have been the purpose of the suit, and that no decree to that effect was ever entered. The Circuit Court of Appeals said that the action was to quiet title (R. 6), and the decree which was actually entered was not one cancelling the contracts of purchase, but one adjudging the United States to be the owner of the lands, and holding that the defendants had no interest in them. The United States had no interest in cancelling the contracts as between the purchasers and the State of Utah.

If, as indicated by the record, before the decree was entered in the former suit all of the deferred installments of the purchase price under the contract (except with respect to the one tract covered by the Gilson purchase, as to which the final installment did not mature until December, 1914)

had been paid by the purchasers to the State, the State at the time that decree was entered held only the naked legal title.

When, pursuant to a contract for the sale of real estate, the contract price has been fully paid, the entire title is equitably vested in the purchaser and he may compel a conveyance of the legal title by the vendor, his heirs, or his assigns. *Jennisons* v. *Leonard*, 21 Wall. 302, 309. This is one of the most familiar grounds for specific performance. See *Bispham's Principles of Equity*, 10th Ed., Section 364. Whatever interest, therefore, the State had then obtained under the original certifications or through the operation of the statute of limitations belonged in equity to the purchasers.

The United States had the right, if it chose, to pursue the equitable owner under the contract and obtain the decree against it. Although the original decree did not in terms transfer to the United States from the Carbon County Land Company all of the interest acquired by that company under the contracts, such was the legal effect for it adjudged that the United States was the lawful owner of the lands and its title was adjudged and decreed to be quieted against all claims, demands, or pretenses whatsoever of the defendants. (R. 4.) Subsequent to that decree the Carbon County Land Company could not, as against the United States, enter into an arrangement with the State canceling the contracts or surrender to the State the interest previously held under the contract.

While the contracts of purchase contained a clause that the obligation of the State should be released if the lands should be determined to be mineral in character, that had no reference to a case of fraud by the purchaser. As a result of the decree in the suit by the United States against the Carbon County Land Company the latter had no right to a refund of the purchase money from the State, because the decree determining that fraud had been perpetrated was not binding on the State, and the Carbon County Land Company could not in a suit against the State to recover the purchase price paid have set up its own fraud as a ground for recovery. We think, therefore, the case should be dealt with as if, at the time of the entry in the present tense of the decree of June, 1914, the Carbon County Land Company, as between it and the State of Utah, was the equitable owner of the lands, or at least all but a small part of them, and that whatever fortification of the State's title had meanwhile occurred through the running of the statute of limitations inured to the benefit of the Carbon County Land Company, and that the effect of the decree then entered was to take from the Carbon County Land Company and revest in the United States any and all interest which that Company had acquired by contract or through the running of the statute of limitations.

If that Company, before that decree was entered, had come into court with a deed from the State granted after the statute had run, and on

that ground had demanded a dismissal of the bill, can there be any doubt what the chancellor would have done? Would he not then have decreed that the entire title, legal as well as equitable, be surrendered up to the United States? What equity would have done then it will do now in aid of and to carry to its logical conclusion the decree then made.

II

IT IS IMMATERIAL THAT THE LEGAL TITLE MAY HAVE PASSED TO THE STATE BY THE CERTIFICATIONS OR WAS UNAFFECTED BY THE DECREE IN THE FORMER SUIT

It is argued on behalf of the petitioners that the legal title to the lands passed to the State of Utah by the certifications made, and was unaffected by the decree in the former suit. That proposition need not be considered.

We are not now concerned with any adjustment of rights between the United States and the State of Utah. It may be that after the statute of limitations had run against a suit to cancel the certification to the State, the State could have given a valid conveyance to an innocent purchaser. It may be that, after the statute had run, the State could have given a valid conveyance to the Carbon County Land Company but for the decree of June 8, 1914. That, however, would not have prevented the United States from suing it for damages for fraud. *United States* v. *Whited & Wheless*, 246 U. S. 552. Instead of doing that, however, the United States, *be-*

fore the statute had run, brought its suit in equity against the wrongdoer, and in that suit procured a judgment establishing its own rightful title to the land. The effect of that decree was to brand forever the perpetrator of the fraud as incapable of becoming a bona fide purchaser or of holding against the United States the fruits of its fraud. See cases cited, *infra*, pp. 21, 22.

The former suit was based upon the case of *Williams* v. *United States*, 138 U. S. 514. In that case there had been a certification to the State of Nevada and the latter had entered into a contract for the sale of the lands certified but had not conveyed the legal title. Suit was brought against the State's transferee alone and it was contended that the action could not be maintained because the state was a necessary party; and, overruling that contention, this Court held that the certification operated to transfer the legal title to the State, while the contract between the State and its transferee passed to him the equitable title, the legal title being retained by the State simply as security for the unpaid part of the purchase price. This Court said (p. 516):

> The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away

> to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government.

It is obvious that the Government relied upon the principles thus announced. Indeed, it is so alleged in the bill. (R. 4.) It seems, however, that its confidence was not justified, for thereafter the State issued its patent to the party which had made use of it as a conduit through which lands had been fraudulently acquired. Having divested the wrongdoer of its equitable title, and having thereafter discovered that the wrongdoer had again succeeded in obtaining from the same source another muniment of title, in accordance with well recognized principles of equity it brought another suit to impress a trust with respect to the new matter. This Court said in *Moore* v. *Crawford*, 130 U. S. 122, 128:

> Whenever the legal title to property is obtained through means or under circumstances "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property

> thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust." Pomeroy Eq. Jur. § 1053.

The moment the legal title vested in the petitioners it became impressed with a trust for the benefit of the United States.

III

THE STATE OBTAINED NO NEW TITLE BY THE RUNNING OF THE STATUTE OF LIMITATIONS

It is argued that by virtue of the statute of limitations the legal title of the State had ripened into an impregnable title on February 10, 1920, when the State patented the lands to the Carbon County Land Company. Of course the State obtained no *new* title by reason of the running of the statute of limitations. The only title which the State had was that conferred by the certification, and that had been adjudged fraudulent, and, so far as petitioners are concerned, forever remained fraudulent. The statute of limitations is to prevent fraud, not to furnish the means by which to make it successful and sure. *Exploration Company* v. *United States*, 247 U. S. 435. The only thing that the statute con-

ferred was immunity from suit. It merely deprived the United States of a remedy.

The United States was, by the decree of 1914, the owner of the equitable title; that is, the beneficial title. The State had long before conveyed that equitable title to the Carbon County Land Company. Indeed, it obtained certification to the lands solely for the purpose of conveying them to that Company. When, therefore, the rights of that company were transferred to the United States, the United States became entitled in equity to a further conveyance of whatever was necessary to perfect and make complete its beneficial use and enjoyment of the property. When the State, unmindful of its duty in the premises, made further conveyance to that company, equity regards that company as holding it for the benefit of the one holding the equitable title. As the conveyance by the State was nothing but an additional step in aid of the original fraud and intended to deprive the United States of the benefits of its decree, so the present suit was but an additional move by the United States, when the conspirators again bestirred themselves, to protect the rights which it had secured under the first decree against the new threat.

This Court said in *United States* v. *Minor*, 114 U. S. 233, 241:

> When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more

> reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.

The United States is entitled in this case to "all the remedy which the courts can give."

IV

THE PETITIONERS ARE BARRED BY THE FACTS ESTABLISHED IN THE FIRST DECREE FROM HOLDING TITLE TO THESE LANDS AS AGAINST THE UNITED STATES

It is argued that the Carbon County Land Company was not by virtue of the decree in the first suit debarred from receiving a patent to these lands, nor from availing itself of the title thereby obtained, since the transactions through which it obtained title were not a continuation of but entirely distinct from the transactions which were the subject of litigation in the first suit. This brings us to the controlling point in the case.

We claim that the Carbon County Land Company was by virtue of the decree in the first suit debarred from receiving or holding legal title to these lands, and we deny that upon the record, the patent from the State in 1920 was entirely distinct from the transactions which were the subject of the first suit. There was no new title in the State not based upon the original fraud. The bill alleges

(R. 4) that the State issued its patent to the same party to which the original contracts of sale had been assigned, and in so doing relied upon the fact "that it had not parted with the legal title to the lands at the time the decree was entered in the before-mentioned suit." While not as definite as it might have been, this allegation plainly means that the title was the same fraudulent title based upon nothing new.

What the claim of the petitioners really amounts to is that they are in the position of *bona fide* purchasers, and therefore are entitled to rights accordingly. But this claim overlooks a fundamental principle of equity, namely, that the original wrongdoer can never become a bona fide purchaser. This Court said in *Rogers* v. *Lindsey*, 13 How. 441, 446:

> A purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The *bona fide* purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a meditated fraud. 1 Story, Eq. Jur., 397, 398, and cases.

To the same effect are *Clark* v. *McNeal*, 114 N. Y. 287; *McDaniel* v. *Sprick*, 297 Mo. 424, containing a very full discussion of the question; *Church* v. *Ruland*, 64 Pa. St. 432, 444, opinion by Justice

Sharswood; *Bourquin* v. *Bourquin*, 120 Ga. 115, opinion by Justice Lamar.

It is stated in *Bispham's Principles of Equity*, 10th Edition, Sec. 265, that the reason for this is "that it would be a gross outrage to allow the man who had originally perpetrated the wrong to reap the benefit of it." See also *The W. B. Cole*, 59 Fed. 182.

The contention of the petitioners overlooks a further principle; that is, that one claiming to be a *bona fide* purchaser has the burden of proof. *Wright-Blodgett Company* v. *United States*, 236 U. S. 397. The present case arises upon a motion to dismiss the bill, and the decision of the Circuit Court of Appeals, reversing that of the District Court, remanded the case with directions to permit these petitioners to answer. They may then set up their claim to be innocent purchasers.

When the petition for certiorari was filed the State of Utah filed a brief in support thereof, appearing as *amicus curiae*. In that brief it is alleged that the land involved contained 5,564.28 acres, and that in 1920 the Carbon County Land Company agreed to pay $100 an acre therefor, and executed its mortgage for $556,428 to secure the indebtedness. (Brief of Attorney General of Utah, p. 2.)

It is further stated that from the record it appears that the contracts annulled required the Milners to pay the State of Utah $1.50 per acre for the land and that from the mortgage it appears that the land company has agreed to pay the State $100

per acre. A copy of the mortgage is set forth as an appendix to the motion of the State of Utah for leave to appear as *amicus curiae*. It bears date the 2nd day of January, 1920. It is signed on behalf of the Carbon County Land Company by A. C. Milner, President. Whether this Milner is related to the Milners involved in the original fraud does not appear, but the similarity of names is significant.

The mortgage is for the entire purchase price, represented by three notes, all bearing date January 2, 1920, one for $100,000, payable on or before January 2, 1930; one for $200,000, payable on or before January 2, 1940; and one for $256,428, payable on or before the 2nd day of January, 1950, none bearing interest until January 2, 1925. It thus appears that no money at all was paid by the Carbon Land Company for the property, but notes were given for the entire amount extending over a period of thirty years. It also contains a provision that the State will release from the mortgage upon payment of $640,000, at any time, 640 acres of the land described. These facts of course are not shown by the record. They might be pleaded by way of answer. The bill admits a mortgage to the State (R. 5) and disclaims any intent to attack it in this case.

Inasmuch as the Attorney General of Utah has placed these facts before the Court, it seems proper to say that in our opinion they throw a strange light upon the good faith of all concerned. A pur-

chaser upon credit does not ordinarily acquire the rights of a *bona fide* purchaser. *Bispham*, Sec. 267. That he has not paid any part of the purchase price and is not to begin paying for ten years and has thirty years to complete does not add to his standing. The whole transaction is plainly a gamble dependent for its success upon the result of this suit.

The Attorney General of Utah also sets forth the deed from Carbon County Land Company to Independent Coal & Coke Company. From this it appears that the consideration was 500,000 shares of the grantee's stock, and an assumption of part of the mortgage.

The petitioners' case is unconscionable. They or their assignors, once adjudged guilty of fraud in inducing the certification so they could purchase from the State, now seek to avoid the effect of that decree and rob the United States of the fruits thereof and of this valuable mineral land on purely technical grounds. If that can be done upon this record, then at last fraud has found a way to circumvent equity. Why a State should have become a party to such a transaction and come here as a "friend of the Court" to help consummate it, is hard to understand.

V

THE STATUTE OF LIMITATIONS APPLICABLE TO PATENTS DOES NOT APPLY TO CERTIFICATIONS

The District Court granted the motion to dismiss upon the ground that the action was barred

by the limitation contained in Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099. The provision is—

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

We have already argued that this suit is not to vacate or annul a certification or a patent. Nevertheless it is at least gravely doubtful whether, in any event, this statute applies in the case of certifications as distinct from patents.

Fundamental to the interpretation of the statute lies the rule of law settled "as a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Whited & Wheless*, 246 U. S. 552, 561. In that case this Court went on to state that this principle "has been accepted by this court as requiring not a liberal, but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the Government," referring to *Northern Pacific Railway Company* v. *United States*, 227 U. S. 355, 367, in which the limitation in the Act of March 2, 1896, c. 39, 29 Stat. 42, was

held not applicable to a patent erroneously issued for Indian lands under a railroad grant, and *La Roque* v. *United States*, 239 U. S. 62, 68, in which the general language of the Act of March 3, 1891, *supra*, was held not applicable to a trust patent for Indian reserved lands. Applying that principle it was held that the statute did not bar a suit for damages.

So also in *United States* v. *Minnesota*, 270 U. S. 181, this statute was held inapplicable where the United States sues to annul patents issued in alleged violation of rights of its Indian wards and of its obligations to them.

In *Exploration Company* v. *United States*, 247 U. S. 435, the statute was limited so that it did not begin to run until the discovery of fraud which had been concealed.

In *United States* v. *Kern River Company*, 264 Fed. 412, C. C. A. 9th Circuit, it was held that the statute did not apply to a suit by the Government to set aside for fraud and mistake the approval by the Secretary of the Interior of a canal company's maps of location filed as the basis of a right of way across public lands. The court, after pointing out the fact that the term patent when applied to a grant of public lands has a well-defined meaning, and quoting Section 458 of the Revised Statutes directing how patents should be signed and countersigned and recorded, said, page 416:

> It is a well-established rule that statutes of limitations do not run against the sov-

> ereign, in the absence of some express statutory provision to the contrary, and if the statute is made applicable to a class of suits only it will not be extended to other cases by implication. It was well known to Congress that grants of public lands are not always made by patent. Indeed, the grant of the right of way in question made by the same act is of that character. And had Congress intended that the bar of the statute should apply, not only to patents but to all legislative grants, it would have so provided in express terms.

See also *Lee Wilson & Co.* v. *United States*, 245 U. S. 24.

This Court has already intimated that the Act of 1891 affected patents only when it stated in *Louisiana* v. *Garfield*, 211 U. S. 70, at page 77:

> It may be that this Act applies to approvals when they are given the effect of patents as well as to patents, which alone are named. * * *
>
> * * * The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the Act of 1871.

That case involved a certification made under the Swamp Land Act of March 2, 1849, c. 87, 9 Stat. 352, which provided that on approval of a list of such lands by the Secretary of the Treasury the fee to the same should vest in the State.

Furthermore, the lands in question were not subject to acquisition by the State of Utah or by the

defendants under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, 109. That was determined in the former case, to which the Carbon County Land Company was a party. *Milner* v. *United States*, 228 Fed. 431. The court said (p. 439):

> The applicants to purchase the land in question, the selecting agents of the state, and the land officers of the United States all acted on the theory that mineral lands or lands containing a deposit of coal did not pass under the grant. It is not claimed that such lands passed, in the briefs of counsel, and the pleadings practically admit the allegation of the bill that the lands granted were to be nonmineral. We are of the opinion, however, that no such contention could be sustained under the facts in this case. Section 2318, R. S. U. S. (Comp. St. 1913, § 4613), provides:
>
> "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."
>
> * * * In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to section 2318, and the general policy of the United States.

While it is true that in *United States* v. *Winona & St. Peter Railroad Company*, 165 U. S. 463, this

Court referred to the word "patent" in this Act as including certification, the decision did not depend upon it, for the Court pointed out the fact that the suit was commenced before the expiration of the time prescribed, and said, referring to the limitations prescribed in that Act (p. 476):

> We only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time, etc.

In that case, however, it must be admitted that the Court held that the word "patent," in Section 1 of the Act of March 2, 1896, c. 39, 29 Stat. 42, 43, in the sentence, "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed," included certifications, for the land involved had been certified. The latter statute, set forth in a footnote to that case, 165 U. S. 468, by the terms of its first section was restricted in its application to patents issued under a railroad or wagon road grant, and the subsequent sections of the Act referred repeatedly to "patented or certified" lands. The suit related solely to lands under railroad grants and the statute obviously was intended to apply to that particular situation.

The term patent, as pointed out in *United States v. Kern River Company, supra*, has a very specific meaning in the land laws, signifying an instrument of especial solemnity signed in the name of the President, countersigned by the recorder of the

General Land Office, and taking effect when there recorded in books especially provided for the purpose. *United States* v. *Schurz*, 102 U. S. 378, 403.

The other sections of the Act of March 3, 1891, do not indicate that the word patent is intended to be interchangeable with certification. As a whole the Act, besides making provisions for rights of way and forest and other reservations, is occupied in repealing, revising, and adding to such general land laws as the timber culture, town site, preemption and homestead laws, which lead to entries and patents. It refers to entries and patents repeatedly, but never to selections, or approvals, or certifications, or to those laws which involve them. It is fair to assume that in enacting Section 8 the attention of Congress was directed to the protection of the kind of titles to which the other portions of the statute so directly related. Such was the conclusion of Attorney General Gregory in an opinion to the Secretary of the Interior, 30 Ops. A. G. 372, 377, in which he said:

> This view is confirmed by section 7, which protects *bona fide* purchases and incumbrances made after final entry, and directs that patents shall issue to entrymen after the lapse of two years from the issuance of receiver's receipt, but confines both of these provisions to entries made under the homestead, timber culture, desert land, or preemption laws, or under the act itself.

The Attorney General in that opinion concluded that the solemnity of patents, the unusual formality

involved in their production, the fact that they wear the dignity and extend the assurance of the Government "in a degree not approached by any other form of Executive conveyance," may well have supplied sufficient reason to Congress for confining the limitation to them instead of extending it to less ceremonious certifications and approvals.

Certifications, on the other hand, are authorized by wholly dissimilar provisions of law. Passing title by certification was authorized by the Act of August 3, 1854, c. 201, 10 Stat. 346, reenacted without substantial change as Section 2449 of the Revised Statutes to cover cases where lands were granted by any law of Congress to one of the several States and Territories, and where the law did not convey the fee-simple title of the lands or require patents to be issued, the list of such lands should be certified by the Commissioner of the General Land Office and—

> shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

Considering the marked distinction between patents and certifications and the fact that Congress,

in the Act of March 3, 1891, was dealing in the other sections of the Act exclusively with that portion of the public land laws in which patents, not certifications, were used in passing title, and bearing in mind further that statutes of limitations against the United States are construed strictly, it is not unreasonable to hold that the word patent in Section 8 of the Act was intended to apply only to patents and not to other forms of conveyance or grant. (30 Ops. A. G. 485.)

By statute and by decisions of this Court, the certification of these known mineral lands was void, beyond the authority of any officer. The disposition of mineral lands is governed by a special code of laws. *Charleston, S. C., Mining & Mfg. Co.* v. *United States* (February 21, 1927); *United States* v. *Sweet*, 245 U. S. 563; *Mullan* v. *United States*, 118 U. S. 271, 276. Under such circumstances the limitation contained in the Act of 1891 should not be deemed applicable.

VI

The judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

RANDOLPH S. COLLINS,
Attorney.

APRIL, 1927.

Office Supreme Court, U.S.
FILED
MAR 8 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

DOCKET NO. [redacted]300

INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY, *Petitioners*,

v.

UNITED STATES OF AMERICA AND CARBON COUNTY, *Respondents*.

MOTION OF STATE OF UTAH FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE SUGGESTIONS IN SUPPORT OF PETITION OF INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY FOR WRIT OF CERTIORARI.

THE STATE OF UTAH:

HARVEY H. CLUFF,
Its Attorney General.

W. HALVERSON FARR,
Assistant Attorney General.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

DOCKET NO. 984.

INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY, *Petitioners*,

v.

UNITED STATES OF AMERICA AND CARBON COUNTY, *Respondents*.

MOTION OF STATE OF UTAH FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE SUGGESTIONS IN SUPPORT OF PETITION OF INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY FOR WRIT OF CERTIORARI.

To The Supreme Court of the United States:

The State of Utah moves the Court for leave to appear herein as *amicus curiae*, and to file the annexed suggestions in support of the petition of Independent

Coal and Coke Company and Carbon County Land Company for a writ of certiorari.

THE STATE OF UTAH:

HARVEY H. CLUFF,
Its Attorney General.

W. HALVERSON FARR,
Assistant Attorney General.

SUGGESTION OF STATE OF UTAH AS *AMICUS CURIAE* IN SUPPORT OF PETITION OF INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY FOR A WRIT OF CERTIORARI.

The State of Utah, although not a party to the suit, believes that its rights are vitally affected by this litigation. It accordingly supports the petition of the Independent Coal and Coke Company and of Carbon County Land Company for a writ of certiorari. If the writ is granted the State will later ask leave to file a brief as *amicus curiae*.

The State, conceiving that it had a good title, conveyed the lands in 1920 to the Carbon County Land Company for $556,428. On January 2, 1920, that Company executed a mortgage to the State to secure the purchase price. (See appendix.) The mortgage was recorded in the proper county in 1920.

By deed of October 16, 1920, Carbon County Land Company conveyed part (1120 acres) of the lands to Independent Coal and Coke Company. (See appendix.) This last named company assumed and agreed in the deed to pay to the State $112,000 of the mortgage in-

debtedness. On December 14, 1920, the State, through its Board of Land Commissioners, directed that the Independent Coal and Coke Company be advised that on the payment of this sum the State would release its mortgage to the 1120 acres. (See appendix.)

If a decree is finally entered in conformity with the opinion of the Court of Appeals the effect will be to pass the legal title to the United States, thus placing the State in the position of being a mortgagee of lands owned by the United States. The Government has indicated that the State's mortgage will form the subject of an original suit in this Court unless the State renounces its claim. The State believes that it acquired a good title to the lands and that its mortgage is valid. It will accordingly not renounce but stands ready to defend its rights. Because of the threatened attack in this Court by the Government on the State's title and mortgage, the State is interesed in having the questions now involved reviewed by this Court.

THE STATE OF UTAH:

HARVEY H. CLUFF,
Its Attorney General.

W. HALVERSON FARR,
Assistant Attorney General.

APPENDIX.

MORTGAGE.

THIS INDENTURE, Made this 2nd day of January, A.D. One thousand Nine Hundred Twenty by and between the Carbon County Land Company, a corporation, by A. C. Milner, President and E. Stanley Pratt, Secretary, of the County of Salt Lake and State of Utah, parties of the first part, and the State of Utah, party of the second part:

WITNESSETH, That the said parties of the first part in consideration of the sum of Five Hundred Fifty-six Thousand Four Hundred Twenty-eight ($556,428.00) Dollars to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, by these presents, do grant, bargain, sell, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, all of the following described tract of land, situate in the County of Carbon and State of Utah, to-wit:

The North half of Section Twenty six (26); the Southeast Quarter and the Northwest Quarter of Section Twenty-two (22); the East Half of Section Twenty-seven (27); all of Section Thirty-four (34); the South Half of Section Thirty-five (35); all of Section Thirty three (33), Township Twelve (12) South, Range Eleven (11) East, Salt Lake Meridian.

Also, all of Section One (1); all of Section Three (3); the North Half of Section Ten (10); the North Half of Section Eleven (11); the North Half and the Southeast Quarter of Section Twelve (12); the East Half of the Northeast Quarter of Section Fourteen (14); Township Thirteen (13) South, Range Ten (10) East, Salt Lake Meridian.

Also, Lot One (1), the Northeast Quarter of the

Northwest Quarter, the Northeast Quarter, the North Half of the Southeast Quarter, the Southeast Quarter of the Southeast Quarter, Section Seven (7), Lots One (1), Two (2), Three (3), the Southeast Quarter of the Southeast Quarter of Section (3), Township Thirteen (13) South, Range Eleven (11) East, Salt lake Meridian, containing in all 5564.28 acres.

To have and to hold the same with all appurtenances hereunto belonging, forever. And the said parties of the first part do hereby covenant and agree, that at the delivery hereof they are the lawful owners of the premises above granted, are seized of a good and indefeasible estate of inheritance therein free and clear of all encumbrances of whatsoever kind and character, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, its successors and assigns, forever, against the lawful claims of all persons whomsoever.

Provided, always, and this instrument is made, executed and delivered upon the following conditions, to-wit:

First—Said party of the first part are justly indebted and promise to pay unto the party of the second part, the sum of Five Hundred Fifty-six Thousand Four Hundred Twenty-eight and No/100 ($556,428.00) Dollars, lawful money of the United States of America, being the purchase price of the lands described herein and sold by the party of the second part to the party of the first part, according to the tenor of three principal notes, executed and delivered by the said parties of the first part, all bearing date January 2nd, 1920, and payable to the said party of the second part on the dates and in the sums, as follows: One note in the sum of $100,000.00 payable on or before January 2nd, 1930, bearing interest at the rate of five per cent per annum from and after Jan-

uary 2nd, 1925, payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity; One note in the sum of $200,000.00 payable on or before January 2nd, 1940, bearing interest at the rate of five per cent per annum from and after January 2nd, 1925, payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity; And one note in the sum of $256,428.00 payable on or before the 2nd day of January, 1950, bearing interest at the rate of five per cent per annum from and after January 2nd, 1925, interest payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity.

Second—The party of the second part hereby agrees that it will upon the payment of $64,000.00 principal, at any time, release from this mortgage 640 acres of the land described herein, to be designated by the party of the first part, in compact form, and will likewise release additional 640 acre tracts upon payment of like additional amounts in the sum of $64,000.00.

Third—Said parties of the first part hereby agree to pay all taxes and assessments levied upon the said premises when the same are due; and to pay to the party of the second part, or assigns, on demand, any money advanced by the party of the second part, or assigns, to remove, purchase or extinguish any prior or adverse or outstanding title, lien, claim or incumbrance on said premises or in any manner to protect its lien thereon; and if not so paid, the said party of the second part, or the legal holder or holders of this mortgage, may, without notice, declare the whole sum of money herein secured due and payable at once, and the mortgagees or assigns may pay such taxes and assessments, and the amounts so paid shall be a lien on the premises aforesaid, and to be secured by this mortgage, and collected in the

same manner as the principal debt hereby secured, with interest thereon at the rate of ten per cent per annum.

Fourth—Said parties of the first part hereby agree to keep all the buildings, fences and other improvements upon said premises in good repair and condition as the same are at this date, and abstain from the commission of waste on said premises until the notes hereby secured are fully paid.

Fifth—Said parties of the first part hereby agree that if the makers of said note shall fail to pay or cause to be paid any part of said money, either principal or interest, according to the tenor and effect of said notes when the same becomes due, or to conform to or comply with any of the foregoing conditions or agreements, the whole sum of money hereby secured shall at the option of the legal holder or holders thereof, become due and payable at once without notice to the makers hereof or their assigns. And in case suit is brought to foreclose this mortgage, the parties of the first part agree to pay a reasonable attorney's fee to be awarded by the court and included in the judgment.

The foregoing conditions being performed, this conveyance to be void; otherwise of full force and virtue.

IN TESTIMONY WHEREOF, The said parties of the first part have hereunto subscribed their names on the day and year first above mentioned.

CARBON COUNTY LAND COMPANY,

By A. C. MILNER,
President.

By E. STANLEY PRATT,
Secretary.

(Acknowledgment)

WARRANTY DEED.

CARBON COUNTY LAND COMPANY, GRANTOR, a corporation organized and existing under the laws of the State of Utah, hereby conveys and warrants to the INDEPENDENT COAL & COKE COMPANY, GRANTEE, a corporation organized and existing under the laws of the State of Wyoming, and doing business in the State of Utah, for a consideration of Five Hundred Thousand (500,000) shares of the capital stock of the grantee and its assumption of the debt hereinafter mentioned, the following described tracts of land situated in Carbon County, State of Utah, particularly described as follows, to-wit:

> All of Section 3; the west one-half of Section 2; the north one-half of Section 10; the east one-half of the southeast quarter of Section 10; and the northwest quarter of Section 11; all in Township 13 South, Range 10 East, Salt Lake Meridian.

It is understood and agreed that of the aforesaid tracts of land all of Section 3, and the north half of Section 10, and the northwest quarter of Section 11, containing One Thousand, One Hundred and Twenty (1,120) acres are, with other lands not herein described, included in and covered by that certain mortgage dated January 2, A. D., 1920, in favor of the State of Utah, and recorded in the records of Carbon County, Utah, in Book "G" of mortgages at page 350, securing an indebtedness of Five Hundred and Fifty six Thousand, Four Hundred and Twenty-eight Dollars ($556,428.00), which indebtedness stands against the lands described in said mortgage on the basis of One Hundred Dollars ($100.00) per acre; One Hundred and

Twelve Thousand Dollars ($112,000.00) of said indebtedness standing against the said 1,120 acres of land last above described.

AND it is further understood and agreed that the said 1,120 acres of land is granted by the grantor herein and accepted by the grantee herein subject to said mortgage indebtedness of $112,000.00 which said mortgage indebtedness the grantee herein assumes and agrees to pay.

The grantor covenants and agrees that the State of Utah will release and discharge the said 1,120 acres of land from the operation of said mortgage upon the grantee herein paying the said indebtedness of $112,000.00, together with such interest as may accrue thereon.

IN WITNESS WHEREOF, the said Carbon County Land Company has hereunto caused its corporate name to be signed and its corporate seal to be affixed, and the same to be attested by the signature of A. C. Milner, its president, and E. Stanley Pratt, its Secretary, thereunto duly authorized on this 16th day of October, A.D., 1920.

CARBON COUNTY LAND COMPANY,

By A. C. MILNER,
Its President.

By E. STANLEY PRATT,
Its Secretary.

(Acknowledgment)

CERTIFIED COPY OF MINUTES.

"A letter from Mr. A. C. Milner, transmitting a copy of a resolution adopted by the Independent Coal & Coke Company, relative to certain coal lands sold by the Board to the Carbon County Land Company, upon which the Board holds a mortgage, was read and considered. Said resolution recites that the Independent Coal & Coke Company has purchased the lands therein described and agrees to make payment to the State of Utah for the same in the sum of $112,000.00. After consideration, on motion of Commissioner Ipson, seconded by Commissioner Stewart, the letter and resolution were ordered filed and the Secretary directed to advise that when the $112,000.00 is paid, a release of the lands in question from the State's mortgage will be executed."

State of Utah, County of Salt Lake, ss:

I, John T. Oldroyd, State Land Commissioner of the State of Utah, hereby certify that the foregoing is a full, true and correct copy of an extract of the Minutes of the State Board of Land Commissioners, of a sitting had December 14th, 1920, as compared with Minute Book of the State Board of Land Commissioners of Utah, No. 15, page 789.

IN WITNESS WHEREOF I have hereunto set my hand and official seal of the said State Land Commissioner on this—day of January, 1924, at Salt Lake City, Utah.

JOHN T. OLDROYD,
State Land Commissioner.

Office Supreme Court
FILED
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WM. R. STAN

No. 300

In the Supreme Court of the United States

INDEPENDENT COAL AND COKE COMPANY and CARBON COUNTY LAND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

ON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF UTAH, APPEARING AS AMICUS CURIÆ, SUPPORTING WRIT OF CERTIORARI

HARVEY H. CLUFF,

Attorney General of the State of Utah.

SUBJECT INDEX OF BRIEF.
CERTIORARI

IV.

LAW POINTS OF STATE.

LIST OF AUTHORITIES.

In the Supreme Court of the United States

INDEPENDENT COAL AND COKE COMPANY and CARBON COUNTY LAND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

ON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF UTAH, APPEARING AS AMICUS CURIÆ, SUPPORTING WRIT OF CERTIORARI

STATEMENT.

The State of Utah has heretofore filed its motion for leave to appear in this court as amicus curiæ in support of the petition of the Independent Coal & Coke Company and Carbon County Land Company for a writ of certiorari, and this Court has by its order permitted the appearance of said State.

In support of its motion the State filed certain suggestions, stating the reasons why it believed that its rights were vitally affected by this litigation. The State was not a party to this suit, either in the United States District Court for the District of Utah or in the United States Circuit Court of Appeals for the Eighth Circuit, and the State has never been a party to any suit or action wherein the title to the land involved in this controversy was drawn in question.

It appears from the record "that during the years 1901 to 1904 there were certified to the State of Utah under certain grants made to the State by the Act of July 16, 1894 (Stats. 109-110)", lands which are specifically described in the complaint. (R. 1).

It further appears from the record that the State made and executed contracts of sale to Stanley B. Milner and other persons, whereby said Milner and his associates undertook to buy said land from the State as agricultural land. (R. 2). In January, 1907, the United States of America instituted a suit against Milner and his associates. The purpose of this suit was to annul and set aside the contracts which said Milner and his associates had made with the State of Utah on the ground that the lands were not agricultural in character but were mineral in character. This suit resulted in a decree in favor of the United States and against Milner and his associates, annuling said contracts, and the Carbon County Land Company was an assignee of Milner and his associates and was a party to the aforesaid suit. The decree of the United States District Court for the District of Utah was made on June 8, 1914, and that decree was affirmed by the Circuit Court of Appeals of the Eighth Circuit on November 15, 1915. (228 Fed. 451). (R. 2, 3, 4).

The State of Utah was not a party to that suit and did not appear or take any part in such suit. No suit or proceeding of any sort was ever brought by the United States of America against the State of Utah for the purpose of in any wise affecting the title to the land involved.

The State of Utah continued to hold the title to this land, and in the early part of the year 1920 conveyed that land to the Carbon County Land Company for the agreed purchase price of $556,42S. The land involved contained 5,564.28 acres. The Carbon County Land Company agreed to pay $100 an acre therefor, and on January 2, 1920, the Carbon County Land Company executed and delivered to the State of Utah that certain mortgage securing the indebtedness of $556,42S. (This mortgage is set forth in the printed Suggestions made by the State in support of its motion for leave to appear in this court; see Printed Suggestions, Pages 4 and 5.)

It thus appears that the transaction between the Carbon County Land Company and the State of Utah in 1920 was in no wise connected with the contracts made between Milner and his associates and the State in the years 1901 and 1904. The transaction of 1920 was entirely new and independent of the contracts annulled by the decree of the United States District Court made June 8, 1914. It appears from the record that the contracts annulled required the Milners to pay to the State of Utah $1.50 per acre for the land described in those contracts. (R. 12). It appears from the mortgage above referred to that the Carbon County Land Company has

agreed to pay the State $100 per acre for the land involved. From these record facts one must conclude that the two transactions were entirely separate and independent.

The State of Utah claimed title to the land from the time of the certifications in 1901 and 1904 continuously until January and February, 1920, when it conveyed that title to the Carbon County Land Company and received back from that Company the Purchase money mortgage for $556,428, and the State of Utah has since the execution of that mortgage claimed that it was a valid obligation, giving a lien to the State of Utah upon the land in question for the amount of the purchase price and interest accumulations.

On October 16, 1920, the Carbon County Land Company sold and conveyed to the Independent Coal and Coke Company 1200 acres of land for the consideration of 500,000 shares of the capital stock of that Company. Eighty acres of the land so conveyed were comprised within a school section, to-wit: Section 2. Eleven hundred twenty acres of the land so conveyed were a part of the land involved in this suit; and the Independent Coal & Coke Company, in addition to giving its 500,000 shares of capital stock to the Carbon County Land Company, assumed and agreed to pay to the State of Utah $112,000 of the mortgage indebtedness due and owing from the Carbon County Land Company to the State of Utah by reason of the aforesaid mortgage. (See Printed Suggestions of the State, Pages 8 and 9.)

CONTENTIONS OF STATE OF UTAH.

The State of Utah makes the following contentions:

1. That the certifications made by the United States in the years 1901 and 1904, through its Secretary of Interior, conveyed title from the United States to the State of Utah.

2. That the decree of the United States District Court of June 8, 1914, affirmed by the Circuit Court of Appeals of the Eighth Circuit November 15, 1915, did not in any manner affect or annul or even disturb the title of the State of Utah to the lands in question.

3. That the State of Utah had a valid title in January and February, 1920; that it had a right to convey and sell the lands in question to whomsoever it saw fit, and that the mortgage held by the State is in all respects valid.

4. That at the time of the commencement of this action, to-wit: May 16, 1924, (R. 1) the United States of America had no interest whatsoever in the land in question.

5. That this action is one to annul and annihilate the State's title and the State's mortgage, and that in any event it is barred by Section 8 of the Act of March 3, 1891 (Stats. 1099), which provides as follows:

> "Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Section 5114, 5 U. S. Compiled Statutes, (1916).

ARGUMENT

CONTENTION NO. 1.

THE CERTIFICATIONS CONVEYED TITLE FROM THE UNITED STATES TO THE STATE OF UTAH.

The United States, by bringing this suit, concedes the validity of this contention. It recognizes that the State of Utah had title to the land until it conveyed it to the Carbon County Land Company by the State Patent dated February 10, 1920. The prayer of the Bill of Complaint in this action states that "unless the State will surrender its claim" an action will be brought against the State of Utah in this court to annul the mortgage held and claimed by the State. (R. 5). That Bill of Complaint says in its prayer:

> "Wherefore, and now that the State of Utah has conveyed the legal title to said lands to the said defendant, Carbon County Land Company, the plaintiff prays that the defendant be adjudged and decreed to hold whatever title they have to the said lands in trust for the plaintiff, and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession, subject only to the mortgage taken by the State to secure the payment of the purchase price", etc.

This quotation from the prayer of the Complaint is consistent with the theory upon which the Complaint rests. That theory is that the State held title; that it had power to convey the title; that it did convey the title, and that the conveyance operated upon the title to the extent of transferring it from the State to the defendants in this action, subject to the State's mortgage. This Complaint shows that the mortgage itself has a legal existance; that it is not absolutely void. It is true the United States claims that it has a right to set that mortgage aside, but no claim is made by the United States that the mortgage is non-existent. The most that could be said for the Complaint of the United States is that the plaintiff claims that the mortgage is voidable; that the title held by the grantees of the State is voidable and not void.

The State of Utah contends that these concessions are an inherent and vital part of the action before this Court. They can neither be avoided nor withdrawn without destroying the very existence of this action. One may not sue to impress land with a constructive trust and have the holder of such constructive trust ordered to convey that land unless that alleged constructive trustee has something to convey. If he has no vestige of title, then, of course, there can be no trust. It seems to the State that it had a title which it could convey. The State believes it had a right to convey this land and that its conveyance of it was not in any sense an abuse of its legal power.

Even if the conveyance by the State is absolutely void, then the judgment of the United States District Court in dismissing the action was sound, regardless of the reasons given. If, on the other hand, the conveyance made by the State was merely voidable, then the judgment of the United States District Court was sound for the reason given, viz: That the Statute of Limitations had barred the right of the United States to proceed.

The sole question before this Court is whether the judgment entered by the United States District Court is sound *for any reason*.

The authority upon which the United States relies for the maintenance of this action conclusively establishes the contention of the State that it held title from the time of the certification continuously until it conveyed to the defendants herein.

Williams vs. United States, 138 U. S. 514; 34 L. Ed. 1026.

On Page 9 of the Brief of the United States, filed in the United States Circuit Court of Appeals in this action, there appears the following language:

> "We rely strongly upon the case of Williams vs. United States."

In that decision Mr. Justice Brewer, speaking for a unanimous court, said:

> "It cannot be doubted that the certification operated to transfer the legal title to the State."

This sentence and the legal result of such certification, which it enunciates, were necessary parts of the judgment of this Court. It was upon such theory that the State predicated its right to sell this land.

CONTENTION NO. 2

THE DECREE OF THE UNITED STATES DISTRICT COURT OF 1914 WAS NOT BINDING UPON THE STATE BECAUSE THE STATE WAS NOT A PARTY TO THE ACTION IN WHICH THE DECREE WAS MADE.

The State believes it is fundamental that no one can be bound by a decree of any court unless he is a party to the suit in which the decree was made. Of course, if he stands in the shoes of any party so that he can be said to be in privity with such party, then, of course, he is in legal effect a party. But the State had the legal title to the land in question. It was not a party to the action brought in the United States District Court in 1907 and decided in 1914. It did not intervene in that suit. It could not have been brought into that action in that court because such an action against the State could have been maintained only in this Court.

The title which the State had, it retained. It never reconveyed it to the United States. It was a title capable of alienation, and when the United States never sought in any wise to disturb that title, the State believed such title had become absolute by lapse of time, i. e. by operation of the Statute of Limitations. The State concluded, and had a right to conclude, that it, by the conduct of the United States, had be-

come vested with a right of property in this land that was above, beyond and immune from attack by the United States. It must be remembered that sixteen years had intervened between the last certification of this land by the United States and the conveyance of the title to the land by the State, and that twenty years had intervened between the time of such certification and the commencement of this action.

By virtue of the provisions of the Enabling Act, dated July 16, 1894, and by virtue of the provisions of the State Constitution, to-wit: Article 20 of that document, the State, if it had title, held the land in trust for the people, to be used and disposed of for the purposes mentioned in said Enabling Act in such maner as the legislature of the State might provide. (See Section 12 of the Enabling Act and Article 20 of the State Constitution).

If the State had a good title to this land in 1920, then it was the legal and moral duty of the officers of such State to defend and preserve that title. The State believed that whatever right, if any, had existed in the United States as against such title, by reason of mistake or error, had been extinguished by reason of the Statute of Limitations, to-wit: Section 8 of the Act of March 3, 1891.

This State has done no wrong. If this land was obtained through patent or certification from the United States by means of mistake or fraud, then undoubtedly the United States had a right to commence an action to vacate or annul that patent or certification, if such action was instituted within the time allowed by law; and under the Williams case, supra, if anyone entered into a contract with the State for the acquisition of the lands involved, and the contract was voidable because of mistake or fraud, then the United States had the legal right to bring an action to annul such contract against the party who had obtained it, but that action and the decree entered therein did not in any wise disturb the title held by the State. That title so held could have been reconveyed to the United States only by the legislature of the State making either a direct legislative grant to the United States or authorizing some State officer to make such a grant. No officer of the State could make such reconveyance without being empowered by some valid legislative act.

In the absence of such legislative act, then, it is perhaps true, as is intimated in the Williams case, supra, that the United States might have compelled such reconveyance by appropriate action brought and prosecuted in this Court, but

such an action, it is submitted, must have been instituted by the United States against the State within the time allowed by law, to-wit: six years after the issuance of the certificate or the discovery of the fraud or mistake. When the legislature of the State did not convey or authorize conveyance, and when the United States did not invoke the jurisdiction of any court to obtain the conveyance of the title to the land from the State, then the Statute of Limitations extinguished all right of the United States, and the right of the State became absolute and valid because no one had any judicial right to question the title of the State. After the expiration of the six-year period the power of the courts had ceased to exist. The question was no longer a matter of judicial cognizance, and the adjustment of the rights, if adjustment was to be made, was a matter of a political nature solely and entirely within the discretion of the legislature of the State.

Under such circumstances, assuming that the State had title and that the United States had a better right which could be enforced by the courts in appropriate actions instituted within the statutory period, it seems to follow that the State could, of course, not be bound by decree made and entered in a suit to which such State was not in any sense a party. If this reasoning is not sound, then it would seem that this whole action was a useless proceeding to obtain something that was non-existent, and that the suggestions made in the opinion of this Court in the Williams case are likewise unsound. The whole matter may be reduced to a simple question: Why was it necessary for either the legislature of the State of Utah to reconvey this title or authorize its reconveyance, or, in the absence of such legislative authority, why was a court action necessary to compel the State to make such reconveyance? If the decree entered in the United States District Court of the District of Utah took from the State everything the certificate passed, it would seem that no such action, either through the courts or through the legislature, would have been of any use whatsoever. Surely the State cannot be deprived of its title, if it has one, through judicial action, except in some case where the State is a party. No such case was ever instituted, and consequently the title of the State, it is submitted, is absolute.

In arguing these matters the various contentions of the State overlap and the discussion already made applies to Contentions Nos. 3 and 4.

(It ought always to be remembered that the Enabling Act granted certain specified Sections, to-wit: 2, 16, 32 and 36, to the State for school purposes, and then it made other grants, some of a floating character, under which grants the State had the right to make selections. Whenever the State selected a given number of acres of land it was charged with the acreage so selected, and it could not by means of selections exceed the total acreage granted. The State selected the land here involved and it has been charged with the amount of acreage so selected. That charge against it has stood for twenty-six years, and to now treat the selection as if it were null and void would seem to be improper and unjust).

CONTENTION NO. 5.

STATUTE OF LIMITATIONS.

The State in a great measure contents itself by referring to the Briefs already filed by the other parties to this suit.

The Act of March 3, 1891, Section 8, in substance says that all suits to vacate and annul patents shall only be brought within six years after the date of the issuance of such patents. The history of the legislation of which this Section 8 is a part seems to make clear that Congress intended no distinction between the word "patent" and the word "certification". In 1887 the Congress of the United States authorized the Attorney General to commence proceedings to cancel all patents, certifications and other evidences of title found to have been erroneously issued in the adjustment of railroad land grants, and then in 1891 Congress enacted a statute undertaking to give security of title to lands theretofore or thereafter obtained from the Government, and then in 1896 Congress again complemented its previous legislation with further enactments relative to this subject.

It seems to the State of Utah that if anyone will read this legislation and apply each part of it, having in mind the purpose which Congress undoubtedly intended, he must come to the conclusion that such purpose was, first to provide some orderly proceeding, in which could be determined the rights of the Government and the rights of the grantees, and, second, to fix a time when all these controversies with reference to title to Government lands could be said to have ceased and determined. Surely Congress could not have intended that the title to lands acquired by means of a formal patent should at some time or other become sure and certain, and that the title to lands acquired by means of an informal patent, to-wit:

a certificate, should remain insecure and uncertain forever and a day. To impute such an intention to the legislative department of the Government is a reflection upon human intelligence.

In the case of United States vs. Winona Railroad, 165 U. S. 463, decided February 15, 1897, this Court held that this legislation to which reference has been made applied to certifications as well as to patents, and applied the amendment of 1896 to a certification. If that amendment of 1896 can apply to a certification, then it is submitted that the entire law must be construed as applying to such informal instruments, and it is submitted that Section 8 must be read so that it will accomplish the purpose which the Federal Congress had in mind.

Mr. Justice Brewer, in his opinion in the Winona case, refers to the "benign influence" of the Statute of 1891. That benign influence cannot operate to its full and complete extent unless the legislation of which the Act of 1891 is merely a part is held to apply to all instruments by which the Federal Government conveys its title. It is true that where the Federal Government is merely a trustee for other parties, such as Indians and other wards, there is no occasion for applying such legislation, but where the Government is acting in the capacity of an owner of the land, then there can be no reason for saying that a lapse of time shall prevent the disturbance of a title when it is conveyed by formal patent, and that the same lapse of time shall have no curative effect when the land is conveyed by means of a certification. Not only have the Courts construed the legislation as we contend, but the Land Department itself has applied a like construction.

Cole vs. State of Washington, 37 L. D. 387.

It was upon such decisions, as well as upon fundamental principles, that the State relied and still relies for the validity of its title and the validity of this mortgage.

It therefore prays that the decision of the United States District Court for the District of Utah be affirmed.

Respectfully submitted,

HARVEY H. CLUFF,

Attorney General of the State of Utah.

SUPREME COURT OF THE UNITED STATES.

No. 300.—October Term, 1926.

Independent Coal and Coke Company and Carbon County Land Company, Petitioners,
vs.
United States and Carbon County.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 31, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances.

The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (§§ 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See *Milner* v. *United States*, 228 Fed. 431, 439; *United States* v. *Sweet*, 245 U. S. 563; *Mullan* v. *United States*, 118 U. S. 271, 276; § 2318 R. S. The grant was not of lands in peace. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon

County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were non-mineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. Although the bill in the present case states that the relief asked was the cancellation of the contracts between the state and Milner and his associates, this allegation is apparently inadvertent, for the record elsewhere indicates that the bill in fact sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States "is the owner" and "entitled to the possession" of the lands in question and that the defendants "have no right, title or interest, or right of possession," and perpetually enjoining them "from setting up or making any claim to or upon said premises." The Court of Appeals, in affirming the decree, held that "the whole transaction was a scheme or conspiracy on the

part of Milner to fraudulently obtain the ownership of the lands from the United States."

In bringing suit in this form without making the State of Utah a party, it is evident that the government relied on the principles announced in *Williams* v. *United States*, 138 U. S. 514. In that case it was held, on a similar state of facts, that the State of Nevada was not a necessary party to the suit and that the contract between it and its purchaser operated to vest the equitable interest in the lands in him, the legal interest being retained as security for the purchase price. This Court said:

"The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrongdoer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government." (pp. 516-517.)

The present suit is founded on the allegation that the State of Utah, not conforming its action to the decision in the first suit, despite the decree and the findings of fraud upon which it was based, has conveyed the legal title to the fraudulent purchasers. The bill was filed in May, 1924, against the Carbon County Land Company and the Independent Coal & Coke Company, petitioners here, and others whose interests are not now material. It sets up the equitable title or interest of the United States in the land, based upon the decree in the first suit, a copy of which, with the opinion of the circuit court of appeals in that case, it incorporates; the conveyance by patent of the state's legal interest to petitioner, the Carbon County Land Company; and explains that the Independent Coal & Coke Company was made a party as it claims an interest in a part of the lands, the full nature and extent of which is unknown to plaintiff. The relief asked is that a trust be impressed in favor of plaintiff, that defendants be ordered to

convey whatever title they have, subject only to any mortgages the state may have retained in conveying the legal title; and that they be enjoined from mining coal.

The defendants separately moved to dismiss the bill on the ground that it failed to state a cause of action against any of them and that the action was barred by the Statute of Limitations, § 8, Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, limiting suits by the United States to vacate and annul patents to six years from the date of issue. The judgment of the district court dismissing the bill as barred by the statute was reversed by the court of appeals for the eighth circuit. 9 Fed. (2d) 517. This Court granted certiorari. 270 U. S. 639.

Petitioners maintain that the bill fails to allege any facts showing that the Carbon County Land Company is a trustee of the lands or bound in equity to surrender them to the government. Conceding the full force and effect of the decree in the first suit, they assert that the State of Utah was not a party to it or bound by its decree; that the title of the state, if ever open to attack by the United States, ripened into an indefeasible title by lapse of time under the six year statute of limitations and that petitioners may clothe themselves with the protection of that title despite the decree in the earlier suit.

We may assume for the purposes of the present case, without deciding, that the state officials were not cognizant of the fraud perpetrated upon the United States and that the legal title of the state was not affected by the decree in the first suit, although the United States in an appropriate proceeding might have procured the annulment of the certification at least within the period of limitations. *Cf. United States* v. *Sweet, supra; Mullan* v. *United States, supra.* But it does not follow that the defendants in the first suit could receive from the state the fruits of their fraud free of an equitable obligation to make restitution to the government or that the United States could not avail itself of all that was adjudged in its favor by the decree in the first suit, even if its original cause of action against the state were barred. By the contracts of purchase Milner and his associates acquired an equitable interest in the land, *Williams* v. *United States, supra.* Their interest was transferred to the Carbon County Land Company, created and controlled by them for that purpose, as a part of the fraudulent con-

spiracy condemned in the first suit. The decree in that suit is conclusive that the company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the state and its officials as agencies to procure the transfer. The decree not only established that the United States was the true and full owner of the land to the exclusion of the defendants, but perpetually enjoined them from setting up or making any claim to the lands. This and the issues of fact there resolved in favor of the United States and pleaded here, lead to the conclusion that none of the defendants, nor any claiming under them with notice, could by any legal device, however ingenious, acquire title from the state free from the taint of their fraud.

The suit is in the nature of a supplemental bill in aid of the former decree and is an appropriate method of securing the benefit of the first decree when subsequent events have made necessary some further relief in order that the plaintiff may enjoy the full fruits of the victory in the first suit. Cf. *Root* v. *Woolworth*, 150 U. S. 401; *Shields* v. *Thomas*, 18 How. 253, 262; *Thompson* v. *Maxwell*, 95 U. S. 391; Story, Equity Pleading, 10th ed., §§ 338, 339, 345, 351 (b), 353, 429, 432. Cooper, Equity Pleading, 74, 75. In determining the scope of the present bill and the relief which may be given upon it, we may consider the pleadings and proceedings in the earlier suit, the nature of which are fully disclosed in the opinion and decree in that suit, which are pleaded here.

It is ancient and familiar learning that one who fraudulently procures a conveyance may not defeat the defrauded grantor or protect himself from the consequences of his fraud by having the title conveyed to an innocent third person. Cf. *Mercy* v. *Abney*, Freem. Ch. 151; *Moore* v. *Crawford*, 130 U. S. 122, 128; *Girard Co.* v. *Lamoureaux*, 227 Mass. 277; *McDaniel* v. *Sprick*, 297 Mo. 424. Equity may follow the property until it reaches the hands of an innocent purchaser for value. Even then the wrongdoer may not reacquire it free of the obligation which equity imposes on one who despoils another of his property by fraud or a breach of trust. The obligation *in personam* to make restitution persists and may be enforced by compelling a return of the property itself whenever and however it comes into his hands. *Bovey* v. *Smith*, 1 Vern. 60; *Kennedy* v. *Daly*, 1 Sch. & L. 355, 379; *Williams* v. *Williams*, 118 Mich. 477; *Talbert* v. *Singleton*, 42 Cal. 390; *Schutt*

v. *Large*, 6 Barb. 373, 380; *Church* v. *Ruland*, 64 Pa. Stat. 432, 444; *Troy City Bank* v. *Wilcox*, 24 Wis. 671; Lewin, Trusts, 12th ed., 1102. So also, a purchaser with notice of an outstanding equity, despite a transfer to an innocent purchaser for value, may not on a later repurchase hold free of the equity. *Clark* v. *McNeal*, 114 N. Y. 287; *McDaniel* v. *Sprick*, *supra*, 439; *Phillis* v. *Gross*, 32 S. D. 438, 449; *Yost* v. *Critcher*, 112 Va. 870, 876; 2 Pomeroy, Equity, § 754. So here the obligation, having its inception in the fraud which was established in the first suit, has been confirmed by the decree and persists as to every interest acquired by petitioners under the contracts with the state or which may be enjoyed by them as the fruit of their fraud, even though we assume for the moment that the title acquired by them could not have been challenged while in the hands of the state.

It having been adjudicated that the government is the true owner of whatever rights the Land Company acquired under the earlier contracts with the state, the decree must be deemed either to have transferred those rights to the government or to have determined that the government is equitably entitled to have them so transferred. If the former, the government may assert the rights under the contract against the Land Company, as holder of the legal title, as it might against any other purchaser of the land from the state with notice. *Bird* v. *Hall*, 30 Mich. 374. If the latter, the Land Company could not acquire the lands even through a new and independent contract without a surrender of such rights as it had under the earlier contracts; and it could not make the surrender effective against the United States, the real owner, without its assent, unless the state stood in the position of a purchaser for value without notice. To these rights the government is equitably entitled, and hence may at its election claim the benefit of their proceeds in the hands of the Land Company. *Cf. United States* v. *Dunn*, 268 U. S. 121; *Taylor* v. *Kelly*, 56 N. C. 240; *Houghwout & Pomeroy* v. *Murphy*, 22 N. J. Eq. 531, 547.

Even if the title acquired were through a new and independent contract and even though it were not in a strict sense proceeds of the earlier contracts, the relation of the Land Company and its equitable obligation to the government, and its duty under the decree in the first suit, are such as to preclude the acquisition of any outstanding interest in the land in violation of the decree, free of that obligation and duty. *Cf. Keech* v. *Sandford*, Sel. Cas. *61;

Lurie v. *Pinanski*, 215 Mass. 229; *Anderson* v. *Lemon*, 4 Seld. 236; *Holridge* v. *Gillespie*, 2 Johnson's Ch. 30; *Griffith* v. *Owen*, L. R. [1907] 1 Ch. 195; *Phillips* v. *Philips*, L. R. 29 Ch. Div. 673; but cf. *Bevan* v. *Webb*, L. R. [1905] 1 Ch. 620; and see also, *Fair* v. *Brown*, 40 Ia. 209; *Kezer* v. *Clifford*, 59 N. H. 208; *Hall* v. *Westcott*, 15 R. I. 373; *Middletown Savings Bank* v. *Bacharach*, 46 Conn. 513.

We need not inquire now whether there may be defenses to the cause of action stated in the bill. It is enough for present purposes that, despite unskilled draftsmanship, it sets out facts sufficient, on a motion to dismiss, to support the relief prayed.

But it is argued that there are no allegations showing that petitioner, Independent Coal & Coke Company, is a party to the fraud or what interest it claims in the lands, or that it acquired any interest from or under any other party to the transaction. But we think it fairly inferable from the bill, taken as a whole, that the interest alleged to be claimed by the Coal Company was one arising subsequent to the conveyance by the state to the Land Company. The bill sets up title in the United States and its transfer to the state, alleging that the State of Utah in making the transfer relied on the fact that it had not parted with the legal title to the lands at the time of the decree. This in effect is an averment that the interest claimed by the Coal Company was acquired subsequent to the certification by the United States to the state. Whatever interest it acquired after that event, it took subject to the equities of the United States, and if from the Land Company, subject also to all of the equities against that company, unless the purchase was *bona fide*. Bona fide purchase is an affirmative defense. *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403.

The Statute of Limitations relied on provides that suits by the United States "to vacate and annul any patent . . . . shall only be brought within six years after the date of the issuance of such patents." A point much argued here was whether a certification of public lands is a patent within the meaning of the statute. But that is a question which we need not decide. Statutes of limitation against the United States are to be narrowly construed. *United States* v. *Whited & Wheelass*, 246 U. S. 552, 561. And we think it plain that the present suit, founded on equitable grounds, to compel a conveyance of title derived from a certification by the government

is not a suit to cancel the certification. See *United States* v. *New Orleans Pacific Ry.*, 248 U. S. 507, 510, 518.

We hold that the acquisition of the title of the lands by the Land Company as set out in the bill was in violation of equitable principles and of the decree enjoining the defendants in the first suit "from setting up or making any claim to the premises", and that a proper case was stated for the imposition on both petitioners of a constructive trust with respect to the lands acquired by them. As the bill is not well drafted, respondent should have leave to perfect it. This will promote an orderly and intelligent disposition of the case.

Affirmed.

Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.